

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

TUES April 11

HJT

To be argued by
LESLIE A. BRADSHAW

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

77-2150

UNITED STATES ex rel. LARRY C. MOSLEY,
Petitioner-Appellant,

vs

Docket No. 77-2150

HAROLD J. SMITH, Supt.
Attica Correctional Facility,
Respondent-Appellee.

B P/5

UNITED STATES ex rel. DORIS McNAIR,
Petitioner-Appellant,

vs

Docket No. 77-2151

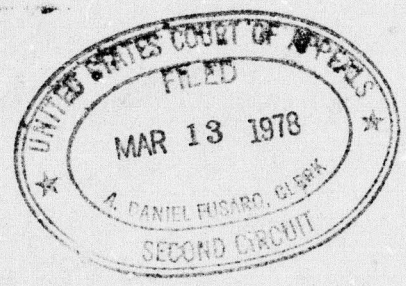
FRANCES CLEMENT, Acting Supt.
Bedford Hills Correctional Facility,
Respondent-Appellee.

On Appeal from the United States District Court
for the Western District of New York

BRIEF OF PETITIONERS-APPELLANTS

Dated: February 15, 1978.

Respectfully submitted,



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STATEMENT OF THE CASE

This is a consolidated appeal by permission from denials of habeas corpus proceedings under 28 U.S.C. §§2241 ff., challenging the constitutionality of the New York State classification and sentencing provisions for the sale and possession of heroin.

PETITIONER MOSLEY - TRIAL COURT LEVEL:

The petitioner Mosley was charged with the class C felony of criminal sale of a dangerous drug (heroin) in the 3d degree under former N.Y. Penal Law (P.L.) §220.35 and §20.00 by Indictment No. 664, filed by the Monroe County Grand Jury on Nov. 16, 1973, and with the class A-III felony of criminal sale of a controlled substance (heroin) in the 3d degree under P.L. §220.39(1) by Indictment No. 84, filed by the Monroe County Grand Jury on Feb. 8, 1974.

On July 19, 1974, the petitioner pleaded guilty to Indictment No. 84 under the new law in satisfaction of both indictments.

By an information signed by Monroe County District Attorney Jack B. Lazarus on Sept. 6, 1974, the petitioner was charged with having previously been convicted of the felony of grand larceny in the 3d degree on July 9, 1970.

By a decision dated Aug. 20, 1974, reported at 78 M2d 736, 358 NYS2d 1004, and an order dated Aug. 29, 1974, Monroe County Court Judge Andrew G. Celli declared P.L. §70.00(2)(a), §70.00(3)(a)(iii), and the last sentence of P.L. §220.39, which had classified the crime charged as a class A-III felony, to be unconstitutional as cruel and unusual punishment under the 8th

Amendment of the U.S. Constitution and under Art. I, Section 5 of the New York State Constitution, and re-classified the crime as a class C felony, which carries a maximum penalty of 15 years imprisonment.

The Monroe County Court based its holding that the drug laws violated the cruel and unusual clauses of the New York and United States Constitutions on its findings that the law violated all 6 standards commonly used to analyze excessiveness under the 8th Amendment: (1) Nature of offense: Heroin does not present the dangers to the user or society which is popularly imagined, and its sale is not a violent act; the circumstances of the individual case cannot be considered in determining the maximum penalty; (2) Nature of offender: Court may not consider whether buyer is an addict or non-addict and may not consider the qualities of the offender or his rehabilitation potential; (3) Other crimes in jurisdiction: Sale of heroin is punished more severely and inflexibly than any other crime, including persistent felony offenders; no view of dangerousness of narcotics can justify that; (4) Same crime in other jurisdictions: New York punishes narcotic offenses more severely than any other jurisdiction. "It seems incomprehensible to the court that a man involved in the sale of narcotics at the four corners in Rochester, may be prosecuted in Federal court, one block to the north, and may under Federal law receive a probationary sentence.....but if he is prosecuted in this court, one block to the south, he must receive a mandatory maximum of life imprisonment."; (5) Model legislation: All major and respected model legislation and reports condemn life imprisonment for this offense and recommend five-year maximums; (6) Conscience of the court: "The life sentence provision is a statute without mercy. It is a statute without the possibility of mercy. It is without compassion. It is vindictiveness retribution. It offends the conscience of the

of the court and beyond reasonable doubt the principle inherent in our Constitution."

On Sept. 20, 1974, Judge Celli sentenced the petitioner to an indeterminate term of 3 to 6 years at the Attica Correctional Facility.

On Sept. 23, 1975, on remand from the New York Court of Appeals, Judge Celli re-sentenced the petitioner to an indeterminate term of one-year-to-life at the Attica Correctional Facility.

The petitioner was represented at the time of the plea by Asst. Public Defender Robert Kammer, on the motion to declare unconstitutional the classification and sentencing provisions, by Asst. Public Defender Leslie A. Bradshaw, and on sentencing and re-sentencing by Monroe County Public Defender Peter L. Yellin.

The petitioner's joint appeal with petitioner McNair is covered separately.

PETITIONER MCNAIR - TRIAL COURT LEVEL:

The petitioner McNair was charged with the class A-II felony of criminal possession of a controlled substance in the 2nd degree under P.L. Section 220.18, and the class A misdemeanors of criminal use of drug paraphernalia (2 counts) under P.L. Section 220.50 and criminal possession of a hypodermic instrument under P.L. Section 220.45, by Indictment No. 662, filed by the Monroe County Grand Jury in 1973.

The petitioner was convicted as charged after a jury trial.

On April 22, 1974, the petitioner was sentenced by Monroe County Court Judge Eugene W. Bergin to concurrent terms of 6-years-to-life at Bedford Hills on the felony count and one year each on the misdemeanor counts.

The petitioner was represented at trial and sentencing by Special Asst. Public Defender Robert S. Beer.

The constitutional issue presented in this proceeding was not raised at the trial level in McNair's case, but was first raised before the Appellate Division in her joint appeal with the petitioner Mosley, which is covered separately.

JOINT APPEAL:

The Mosley and McNair cases were consolidated for purposes of appeal on the issue of the constitutionality of the sentencing provisions of the New York drug law.

By an opinion filed Jan. 16, 1975, reported sub nom., People v McNair, 46 AD2d 476, 363 NYS2d 151 (4th Dept., 1975), the Appellate Division for the 4th Department unanimously reversed the petitioner Mosley's sentence and remitted for resentencing, and unanimously affirmed the petitioner McNair's judgment.

The class A felony classification and mandatory sentencing provisions for the narcotics crimes were upheld on the grounds that the sale of heroin is a violent act because of the havoc wrecked on the addicts, their families, and society, and that the high recidivist rate of addicts and the absence of a known cure or rehabilitation provided reasonable justification for lifetime supervision. The other contentions raised in the McNair case were dismissed without substantive discussion.

The petitioners were represented in the Appellate Division on the constitutional issue by Asst. Public Defender Leslie A. Bradshaw. An amicus brief for the petitioners was presented by the Legal Action Center of the City of New York and the New York Civil Liberties Union.

The petitioners were granted leave to appeal to the New York Court of Appeals, where their appeal was consolidated with several others.

By an opinion filed June 18, 1975, reported sub nom., People vs Broadie, 37 NY2d 100, 371 NYS2d 471 (1975), the orders of the Appellate Division were unanimously affirmed.

Although asserting grave doubts about the wisdom of the drug legislation, the N.Y. Court of Appeals upheld the law as against 8th and 14th Amendment challenges on the grounds that the legislature could reasonably have viewed drug trafficking as symptoms of widespread drug distribution and abuse and consequent social harm, rather than as a series of isolated transactions, as causing crime, including crimes of violence, and as degrading and impoverishing the addict and his family. The legislature could reasonably have shifted emphasis on the purposes of penal sanctions from rehabilitation to isolation and deterrence because of the high recidivism rate in drug-related crime, an inadequate response to less severe punishment, and a growing drug abuse problem. Justification for punishing narcotic offenses more severely and inflexibly than almost any other crime in New York could be justified by the higher and rising incidence of collateral crime generated by drugs, including violent crime. The offense could be punished more severely in New York than in any other jurisdiction because drug trafficking is more extensive in New York. Finally, the court noted that the New York State drug laws were enacted after "thorough investigation", but without mentioning that the enactment went against the recommendations of that "thorough investigation" by the N.Y. Temporary State Commission to Evaluate the Drug Laws.

The petitioners were represented in the N.Y. Court of Appeals on the constitutional issue by Asst. Public Defender Leslie A. Bradshaw.

FEDERAL HABEAS CORPUS (JOINT):

By petitions sworn to on July 18 and 16, 1975, respectively, the petitioners Mosley and McNair applied to the U.S. District Court for the Western District of New York for writs of habeas corpus. Mosley's petition was amended Oct. 9, 1975 to reflect his re-sentencing to a life term after remand by the Court of Appeals.

U.S. District Judge Harold P. Burke signed show cause orders on Oct. 6 and 9, 1975, entered Oct. 8 and 10, 1975, respectively, for Mosley and McNair, directing the respondents to show cause why a writ should not issue.

Leslie A. Bradshaw, who was assigned to represent the petitioners in the state courts, was assigned to represent them in this proceeding, and on Oct. 28, 1975, the two proceedings were consolidated for argument.

The court heard oral argument on the briefs, without a hearing, on July 26, 1976.

By an order signed by Judge Burke on June 22, 1977, entered June 23d, and a judgment made and entered June 23, 1977, the petitions were denied on the basis of People v Broadie, supra, the N.Y. Court of Appeals decision below.

This court granted certificates of probable cause, permitted the petitioners to appeal as poor persons, assigned Leslie A. Bradshaw as counsel, and consolidated the appeals.

STATEMENT OF FACTS
NATURE OF PENALTY & ACCESSORY PROVISIONS

The petitioner McMair was convicted of the class A-III felony of criminal possession of a controlled substance (heroin) in the third degree. The petitioner Mosley was convicted of the class A-III felony of criminal sale of a controlled substance (heroin) in the third degree. Both of these class A-III felonies¹ embrace the possession, sale (and attempted sale) of a narcotic drug in any amount. Before Sept. 1, 1973, these offenses were class C felonies² carrying a discretionary sentence of up to 15 years.³

A person convicted of a class A-III felony must be given an indeterminate sentence⁴ with a maximum term of life imprisonment⁵ and a minimum term of from 1 to 8 1/3 years.⁶ In addition to drastically increasing the range of punishment,

¹ P.L. Section 220.39 (1) and P.L. Section 220.16 (1). Sale of 1/8 ounce or more of a narcotic drug (Heroin, morphine, or cocaine) is a class A-II felony, P.L. Section 220.41, carrying a minimum term of 6 to 8 1/3 years, P.L. Section 70.00 (3)(a)(ii); Sale of an ounce or more of a narcotic drug is a class A-I felony, P.L. Section 220.43, carrying a minimum term of 15 to 25 years, P.L. Section 70.00 (3)(a)(i). All class A felonies carry a maximum term of life, P.L. Section 70.00 (2)(a).

² Former P.L. Section 220.34.

³ P.L. Section 70.00 (2)(c); Section 70.00(3)(b).

⁴ P.L. Section 70.00 (1).

⁵ P.L. Section 70.00 (2)(a).

⁶ P.L. Section 70.00 (3)(a)(iii).

Rockefeller's new drug laws made this imprisonment mandatory, and prohibited sentences of probation and conditional and unconditional discharges.⁷ The only exception to mandatory imprisonment for a class A-III drug felon is for certain drug informers who, under certain circumstances, may be sentenced to probation⁸ for life.⁹

~~As originally enacted in 1973, no class A drug felon could ever be discharged from parole, as could all other felons, including~~ murderers.¹⁰ The law was amended in 1977 to permit drug felons to be discharged from parole on the same basis as others,¹¹ but the class A drug felon nevertheless remains on parole for life after release from prison¹² if discretionary discharge is not granted. Further, any violation of parole conditions while on parole subjects him to reincarceration for life.

An addict who is indicted for (whether or not convicted of) a class A felony is ineligible for civil commitment to the Drug Abuse Control Commission (DACC), despite a finding of addiction,¹³ which is available as an alternative to criminal commitment for other criminal defendants.¹⁴

⁷ P.L. §60.05(1) provides that a person convicted of a class A felony "must be sentenced to imprisonment in accordance with §70.00", which covers only sentences of imprisonment. Probation and conditional and unconditional discharges are covered by P.L. Art. 65. Also, a sentence of intermittent imprisonment is not available for any felony greater than a class D. P.L. §85.00(2)(a).

⁸ P.L. §65.00(1)(b).

⁹ P.L. §65.00(3)(a)(ii). For all other felonies, the period of probation is 5 years. P.L. §65.00(3)(a)(i).

¹⁰ Corrections Law §212(8).

¹¹ Laws 1977, Ch. 904.

¹² P.L. §70.40(1).

¹³ Mental Hygiene L. §81.25(b)(3).

¹⁴ Mental Hygiene L. §81.21; P.L. §60.03.

Originally, all persons indicted for (whether or not convicted of) a class A drug felony were ineligible for treatment as a youthful offender (ages 16 to 19)¹⁵ or a young adult (ages 16 to 21),¹⁶ although a 1975 amendment restricted this prohibition to teenagers indicted for a class A-II or A-I drug felony.¹⁷

At the time of the petitioner-appellants' convictions, a class A-III drug felony indictment could not be reduced through plea bargaining, although class A-II and A-I drug felony indictments could be reduced to an A-III.¹⁸ This restriction did not apply to indictments charging any class A felonies other than drug offenses.

It might be noted that an attempt to commit a class A drug felony is itself a class A felony of the same degree as the completed offense,¹⁹ whereas an attempt to commit any other class A felony (except that of murdering a peace officer)²⁰ is a class B felony.²¹

¹⁵ CPL §720.10(2).

¹⁶ Former P.L. §75.00(3)(a). This statute was repealed by Laws 1974, ch. 652, §7, effective July 1, 1974.

¹⁷ Laws 1975, ch. 832, effective Aug. 9, 1975.

¹⁸ CPL § 220.10(6)(a) prohibited any class A drug felony from being reduced below class A-III. CPL §220.30(3)(b)(i) prohibited any class A drug felony indictment from being satisfied or covered by accepting a guilty plea to less than a class A-III felony on another indictment.

However, a 1976 amendment, prospectively applying to persons sentenced after July 1, 1976, permits a person charged with a class A-III felony to plead down as low as a class C felony; class A-II and A-I indictments are still limited to an A-III plea.

¹⁹ P.L. §110.10(1-3).

²⁰ P.L. §110.10(1).

²¹ P.L. §110.10(4).

ISSUES

The issues are as follows:

1. Does the disproportionality of the mandatory life penalty and accessory provisions for possession and sale of narcotics violate the 8th Amendment cruel and unusual punishment clause or the 14th Amendment equal protection clause?

2. Does the lack of measurable contribution to acceptable goals of punishment render the penalty void under the 8th Amendment cruel and unusual punishment clause?

STATUTES CHALLENGED

The statutes challenged, both together and separately, are as follows:

1. N.Y. Penal Law §220.16 (last unnumbered sentence) and §220.39 (last unnumbered sentence), which classify the criminal possession and sale, respectively, of a controlled substance (heroin) in the third degree as class A-III felonies.

2. N.Y. Penal Law §70.00(2)(a), which sets a mandatory term of life imprisonment for these offenses.

3. N.Y. Penal Law §70.00(3)(a)(iii), which sets a mandatory minimum of 1 to 8 1/3 years for these offenses.

4. N.Y. Penal Law §60.05(1), which prohibits sentences of probation, conditional discharge, and unconditional discharge for these offenses.

5. N.Y. Mental Hygiene Law §81.25(b)(3), insofar as it prohibits class A felons from being certified for civil commitment to a drug rehabilitation program.

SUMMARY OF ARGUMENT

A. DISPROPORTIONALITY (Point I)

A mandatory prison sentence without possibility of probation, with a mandatory maximum term of life (and life-time parole without possibility of discharge if released from prison, plus the denial of youthful offender treatment and a ban against accepting pleas of guilty to lesser included offenses) to be imposed without regard to the circumstances of the particular acts constituting the offense or the character and motivations of the offender, raises grave questions under the Eighth Amendment.

To New York's credit, it has not imposed such a sentencing scheme for any offense, except, to New York's discredit, the sale and possession of narcotics.

Every feature of the New York sentencing structure for the sale and possession of narcotics has generally been condemned when applied to other crimes in the Model Penal Code, the Model Sentencing Act, the A.B.A. Minimum Standards for Criminal Justice, and by the President's Task Forces on Courts and Corrections. Less severe penalties for the sale and possession of narcotics specifically, have been condemned by the President's Task Force on Narcotics and Drug Abuse.

The characteristics of the individual offender, either at the time of sentencing or at any later time while in prison or on parole are relevant only in determining the length of time he must be imprisoned before becoming eligible to be considered for release on parole. The offender may not be placed on probation, but must be imprisoned with a maximum life term and life-term parole if released, regardless of his or her age, character, attitudes, stability, responsibility, family responsibilities, prior criminal record, or rehabilitation potential, and regardless of the adverse consequences of mandatory imprisonment and life-time

parole--in terms of defeating the goal of rehabilitation--to both the offender and society.

Opiate addiction per se has minimal medical, social, and criminogenic effects on the user and society, and its tranquilizing effect markedly reduces violent criminal propensities. The national commissions and private research studies on narcotics unanimously concluded that the adverse medical, social, and criminogenic effects associated with opiate addiction in the last half-century result not from the opiates themselves, but from their criminalization and the heavy penalties imposed for sale and possession.

The primary consequence of the sale of narcotics is the property crime committed to obtain funds to purchase the drugs, the price of which is exorbitant because of the heavy penalties attached to their sale and possession. Crimes of violence by opiate addicts are rare.

Crimes against property, although they are serious, have never been considered as serious or dangerous to society as crimes of violence and terror, yet the sale and possession of narcotics is punished more severely and inflexibly than any other offense in the state of New York. Aside from the sale and possession of narcotics, only murder, attempted murder of a police officer, kidnapping 1st, and arson 1st carry mandatory life sentences, and any of the latter may be reduced by plea bargaining. The courts are limited to imposing no more than 25 years from such class B felonies as arson 2nd (setting fire to an occupied building), manslaughter 1st, rape and sodomy 1st, robbery 1st, and kidnapping 2nd.

The statistical guess by former N.Y. Correctional Services Commissioner Oswald, that narcotics felons have a 50% higher recidivism rate than other felons, is belied by the statistics furnished by his own department, as well as by national statistics, which show that narcotics felons have a slightly lower re-

cidivism rate than others, and that 40% of this recidivism is for further narcotic crimes, rather than for crimes against person or property. The need to permanently isolate narcotic offenders because of their recidivism and extreme danger to society is thus based on a false premise.

Moreover, the Supreme Court will not permit an unconstitutionally excessive punishment to be justified by possible collateral crimes.

A life sentence is discretionary, not mandatory, for a persistent felony offender (conviction of 3 or more felonies). In the case of class B felonies, such as arson 2d, manslaughter 1st, rape 1st, sodomy 1st, robbery 1st, and kidnapping 2d, a person may commit any number of these offenses and, if sentenced at the same time, may not be given more than 30 years' imprisonment.

There are many rational gradations within the offense of selling narcotics. The pusher who sells to a non-addict to try to get him hooked and increase his pool of customers deserves a relatively severe sentence because of the presently incurable nature of opiate addiction. For the same reason, a sale to one who is already physically dependent on opiates is in part a necessary, humane gesture, deserving of a less severe sentence.

The addict needs his supply to survive, and if the physicians are legally prohibited from prescribing it, the black market must step in. New York permits no distinctions to be drawn, however. The addict who sells a small amount of heroin to support his own habit (rather than steal for it), or who gives (without charge) a fix to a friend or spouse who is begging for it to forestall severe withdrawal pains is given a mandatory life sentence, the same as if he or she were a large-scale dealer or a pusher trying to hook high school students.

Other states and countries do make some of these distinctions, several states authorizing extended terms for sales to minors, and England concentrating on sales to non-addicts. No other state requires the imposition of a sentence as severe and inflexible as does New York. Only California requires a life sentence, but the Adult Authority may redetermine the maximum sentence and the court may ameliorate the sentence by accepting pleas to lesser included offenses. Louisiana authorizes a life sentence, but the court is empowered to place an offender on up to 5 years' probation where warranted by the circumstances, and both the court and the executive authority have very liberal commutation powers. Only 5 other states authorize, but do not require, life imprisonment, and all offer the alternative of probation. The vast majority of states and the federal government authorize maximum terms of between 10 and 20 years. Respected model legislation uniformly recommend a 5-year maximum sentence.

Although a New York narcotics sale offender might be released on parole at some time during his life sentence, he need not be, and the courts presently have little power to review the parole board's determinations denying parole. This problem is compounded by the parole board's absence of any guidelines for parole release, their cursory review of files in making the release determination, their

subjection to political and popular pressures, and the onerous parole conditions under which the parolee must continue to live the rest of his life if paroled, including life-time surveillance, control over almost every aspect of his life, being subject to harassing searches without probable cause at any time of day or night, and being subject to return to prison for violation of any one of the non-criminal rules of conduct to which no law-abiding person could unswervingly adhere, no matter how conscientiously he tried.

Aside from these realities of parole, in determining whether the New York sentencing structure is cruel and unusual or a denial of equal protection, the court must disregard any ameliorative powers possessed by the parole authorities, and base its decision on the punishments prescribed by law. The law requires that the offender remain subject to imprisonment for the remainder of his life, and a real possibility exists that the offender will remain so imprisoned. The greater punishment of life imprisonment must itself be within the legislature's constitutional power to impose, not any lesser period of actual incarceration set in the discretion of an administrative body as an incentive to good behavior. Life-time parole must also be considered by the court, as must the mandatory imprisonment and plea-bargaining features of the law, which preclude the courts from exercising their traditional alternative means of mitigating harsh penalties where called for by the circumstances of the particular offense and offender.

The classification of narcotics sales as a class A felony, with the special sentencing restrictions applicable only to that offense, is cruel and unusual under all of the tests laid down by the courts. It offends against evolving standards of decency as measured by knowledgeable and humane opinions. It is grossly disproportionate to the degree of seriousness and danger to society posed by the nature of the crime, the circumstances, and the criminal, and defeats one

of the basic penological purposes of punishment--rehabilitation. It is grossly disproportionate to punishment imposed for much more serious crimes in New York and to punishment imposed for the same crime in all other jurisdictions, as well as to punishment recommended by the drafters of respected model legislation and by national commissions.

Insofar as the sale of narcotics is punished far more severely than other crimes of a similar or more serious nature in New York, the classification is also an arbitrary one, resulting in a denial of equal protection of the laws.

B. LACK OF MEASURABLE CONTRIBUTION TO ACCEPTABLE GOALS OF PUNISHMENT
(POINT II).

The United States Supreme Court has made a punishment unconstitutionally excessive under the 8th Amendment, not only if it is grossly disproportionate to the severity of the crime, but also on the independent ground that it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."

A 4-year study of the 1973 New York drug law and other reliable indicators have shown that it has made no measurable contribution either to acceptable goals of punishment generally or to the specific goals sought for this law. The law is shown to have had no effect on drug use, to have failed to stem the tide of serious property crime, to have had no effect on the risk of incarceration, and to have in fact led to fewer convictions.

A half-century of experience has shown that the primary result of increased penalties for narcotics has been an increase in the black market price of the drugs and a concomitant rise in collateral crime to get the money to buy the drugs, resulting in turn in greater poverty, neglect of family and medical problems and lack of time to be socially useful.

Drug rehabilitation programs in New York--cut off from the drug offender under the new law--have been highly successful in the past 3 1/2 years. Arrests for addicts admitted to methadone maintenance programs in N.Y.C. declined to one-fourth their previous level, and arrests for addicts who had remained in the programs as long as 13 months declined to 4% of their previous level. Additionally, addicts stabilized on methadone are said by the New York Temporary State Commission to Evaluate the Drug Laws to be "either indistinguishable from or even better than other workers with similar capacities".

The substitution of a life sentence for a commitment to an existing rehabilitation program or a lesser sentence coupled with such a commitment, is unnecessary and counter-productive. The prohibition against commitment to such a program is unbelievable.

It is true that methadone maintenance, therapeutic communities, antagonist treatment, and drug-free treatment are still unable to attract or rehabilitate all heroin addicts (although the many who can be cured under these programs must still be given a life sentence), but it is equally true that all alternative treatment modalities have not been exhausted. The major successful program which has not been tried in New York is heroin maintenance.

The British experience with heroin maintenance under strict medical control has almost completely eliminated collateral crimes by addicts, has almost com-

pletely eliminated the black market in narcotics, has stabilized the spread of narcotics usage, has eliminated most of the medical problems associated with addiction, and has resulted in addicts leading normal, socially productive lives. It should not be overlooked that a heroin pill purchased by the British government through legitimate channels costs just over 2 cents.

America had no significant criminal or social problem with heroin addicts until the 1914 Harrison Act made narcotics illegal and forced addicts into the black market. Present day experiments in Kentucky also confirm the normal, socially productive, non-criminal lives that can be produced when addicts are able to obtain their supplies legally.

The present penalties merely give the "appearance" of fighting crime, while in reality producing it. The present rehabilitation programs plus a heroin maintenance program should all but eliminate the crime now associated with addiction.

Were such a program to be initiated in New York, the illegal sale or possession of narcotics would still be punished, if only because it is done outside medical channels, without medical supervision, and would impede the benefits obtained through the clinics, and also because it would tend to spread the use of narcotics to non-addicts.

New York should not be forced to adopt a heroin maintenance program, but the Constitution does force New York not to impose a mandatory life sentence with a mandatory minimum term which is grossly out of proportion to the severity of the crime, which makes no measurable contribution to acceptable goals of punishment, but rather is counterproductive, and which is nothing more than the purposeless and needless imposition of pain and suffering.

POINT I

DISPROPORTIONALITY OF PENALTY VIOLATES 8th AMEND. CRUEL
AND UNUSUAL PUNISHMENT CLAUSE AND 14th AMEND. EQUAL
PROTECTION CLAUSE.

A. LEGAL PRINCIPLES - AN OVERVIEW.

1. GENERAL STANDARDS FOR 8th AMEND.

The legislature is accorded broad discretion in setting penalties for crimes, but the final judgment on whether those penalties exceed constitutional limitations is a judicial function, exercised to prevent old penalties from continuing after being condemned by changing community standards, to prevent overly zealous legislators and judges from imposing penalties beyond the bounds of society's tolerance, and to prevent the will of the majority from unfairly interfering with the rights of persons who may be unable to protect themselves through the political process.²⁶

The 8th Amendment prohibition against cruel and unusual punishment, applicable to the states,²⁷ is not limited to the prohibition of atrocities that would have shocked the 18th century framers of the Constitution. The clause "is not static",²⁸ but is applied to advancing and changing times, guided by human

²⁶See, generally, In re Lynch, 105 Cal Rptr 217, 503 P2d 921, 923 (Cal. Sup. Ct., 1972) (in bank).

²⁷See Anno. by Sheldon R. Shapiro, "Federal Constitution Guaranty Against Cruel and Unusual Punishment--Supreme Court Cases", 33LEd2d 932, 936, Section 3 of which concerns the applicability to the states of the 8th Amend.

²⁸Trop v Dulles, 356 US 86, 101 2 LEd2d 630, 642, 78 SCt 590 (1958). (plurality op. by Warren, C.J.).

"dignity",²⁹ "public opinion...enlightened by a humane justice",³⁰ "the evolving standards of decency that mark the progress of a maturing society",³¹ and "contemporary human knowledge",³² "even though popular sentiment may favor them [the penalties]".³³

Under Coker and Gregg, the U.S. Supreme Court has made a punishment unconstitutionally excessive if it either:

"(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering;

OR

(2) is grossly out of proportion to the severity of the crime."^{33a}

The court made it clear that these grounds were alternative; that a punishment which is disproportionate for the crime is cruel and unusual even if it may measurably serve acceptable goals, and vice versa.^{33b}

²⁹ Trop v Dulles, supra, 356 US at 100, 2 LEd2d at 642; Gregg v Georgia, 428 US 153, 173, 49 LEd2d 859, 874, 96 Sct 2809 (1976), reh.den., 429 US 875, 50 LEd2d 158, 97 Sct 197, 198.

³⁰ Weems v United States, 217 US 349, 378, 54 LEd 793, 803 (1910).

³¹ Trop v Dulles, supra, 356 US at 101, 2 LEd2d at 642; Gregg v Georgia, supra, 428 US at 173, 49 LEd2d at 874; Woodson v North Carolina, 428 US 280, 301, 49 LEd2d 944, 959, 96 Sct 2978 (1976).

³² Robinson v California, 370 US 660, 666, 8 LEd2d 758, 763, 82 Sct 1417 (1962).

³³ Furman v Georgia, 408 US 238, 331, 33 LEd2d 346, 402, 92 Sct 2726 (1972)(Marshall, J., concur. op.); Gregg v Georgia, supra, 428 US at 173, 49 LEd2d at 874.

See generally, Anno. by Sheldon R. Shapiro, "Federal Constitutional Guarantee Against Cruel and Unusual Punishment--Supreme Court Cases", 33 LEd2d 932; Anno. by Howard J. Alperin, "Comment Note--Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment", 33 ALR3d 335.

^{33a} Coker v Georgia, ___ US ___, 53 LEd2d 982, 989, 97 Sct 2861 (1977); see also, to the same effect, Gregg v Georgia, supra, 428 US at 173, 49 LEd2d at 875.

^{33b} Coker v Georgia, supra, 53 LEd2d at 989 & n.4.

a. APPLICATION.

As some evidence of public opinion enlightened by humane justice and contemporary knowledge, the New York Times has editorialized against the "harsh penalties" imposed under Rockefeller's "unjust" and "ultra-severe" drug laws, enacted under the influence of 17th century "witchcraft mania".³⁴

For Fourth Circuit, in a different context, said:

"Life imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others."^{34a}

A survey of 100 N.Y.C. judges and drug rehabilitation specialists by the N.Y.C. Addiction Services Agency, published in 1977, found that about 70% of both judges and drug specialists were dissatisfied with the 1973 law and wanted less reliance on legal sanctions.^{34b} More than half thought that the new law had actually had negative results on the drug problem,^{34c} including the introduction of minors into the drug distribution network because of their legal exemption from the mandatory life penalties.^{34d}

The Joint Committee of the N.Y.C. Bar Assn. and the Drug Abuse Council, Inc., which studied the new law for 4 years under a L.E.A.A. grant, concluded that it was a complete failure.^{34e}

³⁴ "Circumventing Folly", editorial, New York Times, July 3, 1974, p. 30, c.l.

^{34a} Hart v Coiner, 483 F2d 136, 141 (CA4, 1973), cert. den., 415 US 938, 39 LE2d 495, 94 Sct 1454 (1974), reh. den., 416 US 916, 40 LE2d 118, 94 Sct 1624 (1974).

^{34b} Addiction Services Agency, A Survey on the Effects of Drug Laws: Preliminary Findings (N.Y.C. Addiction Services Agency, 65 Worth St., N.Y.C. 10013, Jan. 18, 1977), pp. 14-15.

^{34c} Id., p. 8.

^{34d} Id., p. 6.

^{34e} Assn. of the Bar of the City of New York/Drug Abuse Council, Inc., The Nation's Toughest Drug Law: Evaluating the New York Experience (Final Report of the Joint Committee on New York Drug Law Evaluation)(1977).

The New York Times also reported that State Supreme Court Justice Abraham I. Kalina, supervising judge of the Special Narcotics Court in Manhattan, said that the "overwhelming majority" of judges hearing drug cases in that borough were opposed to the new laws because they were "too tough on the little guy" who used drugs and occasionally sold them to support his habit, but did not engage in commercial profiteering.³⁵

Similar harsh criticism of the new law has been made by the federal district court judges from the 1st and 2d Circuits attending a seminar of the Federal Sentencing Institute,^{35a} by the presiding justices of the 1st and 2d Departments of the N.Y. Appellate Division,^{35b} and by most of the courts, including the New York Court of Appeals, which have begrudgingly declined to declare the law unconstitutional.

--JUDICIAL RESTRAINT.

Monroe County Court Judge Celli, below, and U.S. District Judge Motley found that the drug laws were so harsh, so unjust in their application, and based on such skimpy rationale, that they forthrightly declared them unconstitutional.^{35c}

The higher New York state courts had similar reactions, without the same action.

³⁵ "Drug Flow Noted Despite New Laws", New York Times, June 25, 1974, p.1, c.2, at p. 60, c.4.

^{35a} New York Times, Jan. 6, 1973, p.1, c.6.

^{35b} New York Times, Jan. 13, 1973, p.33, c.1.

^{35c} People v Mosley, 78 M2d 736, 358 NYS2d 1004 (Monroe Co.Ct., 1974), rev'd sub nom., People v McNair, 46 AD2d 476, 363 NYS2d 151 (4th Dept., 1975), aff'd. sub nom., People v Broadie, 37 NY2d 100, 371 NYS2d 471 (1975); United States ex rel. Carmona v Ward, ___ F Supp ___, 21 CrL 2475 (S.D.N.Y., 1977), app. pending (CA2, Docket No. 77-2110).

The Appellate Division for the Second Department said that:

"While the statutory penalties are indeed harsh and in many cases unjust, any amelioration of their mandatory nature is a function of the Legislature, not the courts." ^{35d}

The Appellate Division for the Fourth Department, below, after upholding the statutes, said:

"In so stating, we do not mean to suggest that these new penal provisions are without troublesome aspects. They are not....First and foremost is the failure to distinguish between the person who is diseased (i.e., the addict) from the non-addict peddler....Further, the lifetime parole aspect is troublesome...." ^{34e}

The New York Court of Appeals, below, concluded its finding that the laws were constitutional with the statement that:

"In so holding, in the exercise of judicial restraint and with respect for the separation of powers, the Court does not necessarily approve or concur in the Legislature's judgment in adopting these sanctions. Their pragmatic value might well be questioned, since more than a half-century of increasingly severe sanctions has failed to stem, if indeed it has not caused, a parallel crescendo of drug abuse." ^{34f}

Finally, in what must be regarded as the ultimate inconsistency in the application of judicial restraint, the Appellate Division for the Second Department ruled that the mandatory life sentences for 3d degree sale of heroin is not unconstitutionally excessive, ^{34g} while only two weeks earlier, the same court, ruling on the same degree of the same crime under the former Penal Law (for which the statutory maximum was 15 years), held that an 8-year term was excessive, and modified the sentence to a 3-year term. ^{34h}

^{34d} People v Broadie, 45 AD2d 649, 360 NYS2d 906, 912 (2d Dept., 1974).

^{34e} People v McNair, 46 AD2d 476, 481-82, 363 NYS2d 151, 157 (4th Dept., 1975).

^{34f} People v Broadie, 37 NY2d 100, 117-18, 371 NYS2d 471, 481 (1975).

^{34g} People v Broadie, 45 AD2d 649, 360 NYS2d 906 (2d Dept., Nov. 18, 1974).

^{34h} People v Martinez, 46 AD2d 779(19), 360 NYS2d 458 (2d Dept., Nov. 4, 1974) (ruling on former P.L. §220.35).

The doctrine of judicial restraint was never meant to be carried so far. Recent U.S. Supreme Court cases have made it quite clear that legislative judgments alone are hardly determinative, since the 8th Amendment was intended to safeguard individuals from the abuse of legislative power,³⁴ⁱ and contemplates that in the end, the court's own judgment will be brought to bear on the question.^{34j}

Recognizing that cruelly excessive punishments might be legislated through honest, as well as sinister zeal,^{34k} the court, in Weems, said that justice requires that the legislative powers be restrained by constitutional limitations, and that the state suffers no loss by the limitations, because the purposes of punishment (repression of crime, prevention of its repetition, punishment of the offender, and hope for reformation of the offender) are fulfilled "by penalties of just, not tormenting, severity".^{34l}

³⁴ⁱ Gregg v Georgia, supra, 428 US at 174, n.19, 49 LEd2d at 875, n.19.

^{34j} Coker v Georgia, supra, 53 LEd2d at 992.

^{34k} Weems v United States, 217 US at 373, 54 LEd at 801.

^{34l} Id., 217 US at 381, 54 LEd at 804.

2. DISPROPORTIONALITY PRINCIPLE.

Under Coker and Gregg, the U.S. Supreme Court has now put beyond question that a punishment is unconstitutionally excessive under the 8th Amendment if it is "grossly out of proportion to the severity of the crime."³⁵

In holding to be cruel and unusual,³⁶ for making false entries in government cash books, the penalty of cadena temporal (involving a statutory mandatory minimum of 12 years' imprisonment in chains at hard and painful labor, followed by perpetual surveillance), the Supreme Court, in Weems, noted that the penalty was much more severe than those prescribed in other jurisdictions for similar crimes,³⁷ that there were no gradations of the offense,³⁸ and that the sentence was mandatory regardless whether the offender did, or intended to, injure or defraud anyone or obtain a personal gain.³⁹ "It is a precept of justice"; said the court, "that punishment for crime should be graduated and proportioned to the offense."⁴⁰

³⁵ Coker v Georgia, supra, 53 LEd2d at 989; Gregg v Georgia, supra, 428 US at 173, 49 LEd2d at 875. This is one of alternative grounds.

³⁶ Although Weems was technically decided under the Philippine Bill of Rights provision prohibiting cruel and unusual punishment, the court noted that this provision was taken from the U.S. Constitution, and "must have the same meaning". Weems v United States, 217 US 349, 367, 54 LEd 793, 798 (1910).

Weems has been reaffirmed in its applicability to the 8th Amendment, in Gregg v Georgia, supra, 428 US at 171, 49 LEd2d at 873; and in Trop v Dulles, 356 US 86, 100, 110, 114, 2 LEd2d 630, 642, 647, 650, (1958) (plurality op. by Warren, C.J., concurred in by Black, Douglas, & Whittaker, JJ.) & (concurring op. by Brennan, J.).

³⁷ Weems v United States, supra, 217 US at 380-81, 54 LEd at 804.

³⁸ Id., 217 US at 381, 54 LEd at 804.

³⁹ Id., 217 US at 363, 365, 54 LEd at 797.

⁴⁰ Id., 217 US at 367, 54 LEd at 798.

The lifelong parole features of the penalty were also condemned,⁴¹ in Weems, because the offender would suffer perpetual surveillance and would be:

"subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty."⁴²

The pre-Gregg disproportionality principles enunciated by the U.S. Supreme Court were summarized in two exhaustive, well-organized opinions by the in bank California Supreme Court, in In re Lynch,⁴³ and In re Foss,⁴⁴ in which four primary techniques to aid in administering the principle which had been used by the U.S. Supreme Court and others were identified and explained:

(1) One technique is to examine the nature of the offense and the offender, along with the circumstances of the particular conduct constituting the crime, with particular regard to the degree of danger presented to society.⁴⁵ Also relevant is a consideration of the penological purposes of the punishment and the effect on rehabilitation.⁴⁶

⁴¹ The court, in Weems v United States, supra, 217 US at 377, 54 LEd at 802, found the punishment to be "cruel in its excess of imprisonment and that which accompanies and follows imprisonment."

⁴² Id., 217 US at 366, 54 LEd at 798.

⁴³ In re Lynch, 8 Cal 3d 410, 105 Cal Rptr 217, 503 P2d 921 (Calif.Sup.Ct., 1972)(in bank), reh.den., 1973. Although the court technically made its decision under the cruel or unusual clause of the California Constitution, it relied on constructions of the U.S. Constitution by the U.S. Supreme Court and other state courts in formulating its rules.

⁴⁴ In re Foss, 10 Cal 3d 910, 112 Cal Rptr 649, 519 P2d 1073 (Calif.Sup.Ct., 1974)(in bank).

⁴⁵ In re Lynch, supra, 503 P2d at 930-31; In re Foss, supra, 112 Cal Rptr at 654-57.

⁴⁶ In re Foss, supra, 112 Cal Rptr at 654, 657-58.

(2) The second technique is to compare the challenged punishment with that prescribed in the same jurisdiction for more serious offenses.⁴⁷

(3) Thirdly, the court should compare the challenged punishment with that prescribed for the same offense in other jurisdictions.⁴⁸

(4) Closely related to the third criteria is the weight to be accorded the views of the draftsmen of respected model legislation.⁴⁹

These techniques are explained, documented, and applied to the 1973 N.Y. drug law in the subsections following.

⁴⁷ In re Lynch, supra, 503 P2d at 931-32; In re Foss, supra, 112 Cal Rptr at 654, 658-60.

⁴⁸ In re Lynch, supra, 503 P2d at 932; In re Foss, supra, 112 Cal Rptr at 654-55, 660.

⁴⁹ In re Lynch, supra, 503 P2d at 933; In re Foss, supra, 112 Cal Rptr at 660-61.

P. DANGEROUSNESS TO SOCIETY

1. NATURE OF THE CRIME

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B. DANGER TO SOCIETY.

1. NATURE OF THE CRIME.

a. LEGAL PRINCIPLES.

The most obvious criteria for determining whether a punishment is cruel and unusual is the nature of the crime for which it was imposed, with particular regard for the degree of danger it presents to society.¹

The violent or nonviolent nature of the crime is a major consideration,² as is the extent to which the victim or society suffers actual injury, loss, or other damage,³ and whether there is

¹ Coker v Georgia, supra, ___ US ___, 53 LEd2d at 993; People v Broadie, 37 NY2d 100, 112, 371 NYS2d 471, 476 (1975); In re Lynch, supra, 503 P2d at 930-31; In re Foss, supra, 112 Cal Rptr at 654.

In "circumstances of terror and danger", said the court, in Weems v United States, supra, 217 US at 379-80, 54 LEd at 803, "there is something more to give character and degree to the crimes than the seeking of a felonious gain, and it may properly become an element in the measure of their punishment." Thus, the court noted the justification for more severe penalties for burglaries committed at night and for arson when humans are in the building.

² In re Foss, supra, 112 Cal Rptr at 654 (nonviolent nature of selling heroin); People v Lorentzen, 387 Mich 167, 194 NW2d 827, 834 (Mich.Sup.Ct., 1972) (nonviolent nature of selling marijuana); In re Lynch, supra, 503 P2d at 931, 934-35 (nonviolent nature of indecent exposure).

³ Coker v Georgia, supra, 53 LEd2d at 993. Weems v United States, supra, 217 US at 363, 365, 54 LEd at 797, where the court twice mentions that the lengthy sentence for falsifying a government record is mandatory regardless whether the offender does, or intends, to injure or defraud anyone, so long as the entry is false, and, Id., 217 US at 367, 54 LEd at 798, states that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense."

Ralph v Warden, Maryland Penitentiary, 438 F2d 786, 794 (CA2, 1974) (op. by Haynsworth, J., denying reh. en banc), saying that "the nature, degree and duration of the harm have long been recognized as important criteria in determining the appropriateness of punishment."

In re Lynch, supra, 503 P2d at 935, saying that the harm to the victim and to society of indecent exposure is minimal at most.

People v Bruinsma, 34 Mich App 167, 191 NW2d 108, 116 (Mich.Ct.App., 1971), citing scientific investigations which seriously questioned whether marijuana is harmful or if so, whether it is nearly as harmful as certain narcotics, as a major reason for voiding as cruel and unusual, a mandatory minimum sentence of 20 years for selling marijuana.

an intent to injure.⁴

Murder is explicitly recognized by the Supreme Court as "the most extreme of crimes",⁵ to which not even other serious crimes of violence can compare for sentencing purposes:

"Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder,⁶ which does involve the unjustified taking of human life."

"...even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances.

"It is difficult to accept the notion, and we do not, that the rape, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim."⁷

The non-violent nature of the crimes of selling heroin⁸ and marijuana⁹ has led state courts to invalidate long mandatory sentences under the 8th Amendment, as have scientific investigations seriously questioning whether marijuana is harmful.¹⁰ But in New York, possession or sale of heroin is punished as severely as, and more inflexibly than, murder.

3, cont.

"The difference between murder and attempted murder is a fortuitous accident without relevance to the assailant's moral culpability, but in every jurisdiction which retains capital punishment for murder, the survival of the victim avoids all possibility of imposition of the death penalty." Ralph v Warden, Maryland Penitentiary, 438 F2d 786, 794 (CA2, 1974) (op. by Haynsworth, J., denying reh. en banc).

⁴ Weems v United States, supra, 217 US at 363, 365, 54 LEd at 797.

⁵ Gregg v Georgia, supra, 428 US at 187, 49 LEd2d at 882.

⁶ Coker v Georgia, supra, 53 LEd2d at 993.

⁷ Id., 53 LEd2d at 994.

⁸ In re Foss, supra, 112 Cal Rptr at 654.

⁹ People v Lorentzen, 387 Mich 167, 194 NW2d 827, 834 (Mich. Sup.Ct., 1972).

¹⁰ People v Bruinsma, 34 Mich App 167, 191 NW2d 108, 116 (Mich.Ct.App., 1971).

Property crimes are considered to be less dangerous to society than crimes against the person.¹¹

In upholding the constitutionality of the 1973 drug laws, the New York Court of Appeals stressed that the legislature could reasonably have found that drug trafficking is a generator of collateral crimes, including some crimes of violence, and that narcotic felons have a higher recidivism rate than others.¹²

However, the United States Supreme Court later firmly established, in Coker, that an excessive punishment for an offense may not constitutionally be justified by the possibility of associative collateral crimes, even in the case of rape which is often accompanied by brutal assaults and murder:

"Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not.the death penalty...is an excessive penalty for the rapist who, as such, does not take human life." ¹³

¹¹ Weems v United States, supra, 217 US at 379-80, 54 LEd at 803; (see quote, supra, at fn. 1); People v Lorentzen, supra, 194 NW2d at 834; In re Lynch, supra, 503 P2d at 931, 934-35; In re Foss, supra, 112 Cal Rptr at 654.

¹² People v Broadie, 37 NY2d 100, 112-13, 116, 371 NYS2d 471, 476-77, 480 (1975).

¹³ Coker v Georgia, supra, 53 LEd2d at 993.

This rule was echoed by the U.S. Dist.Ct. in declaring the 1973 N.Y. drug sentencing laws unconstitutional:

"it is necessary to judge the proportionality of a punishment with relation to the actual offense committed; a penalty cannot be justified solely by the potential for more serious conduct, even though it may be violent and dangerous.

"....Clearly there are constitutional limits to the extent to which the statistical, or assumed, connection between a particular offense and collateral crimes may be used to justify a particularly harsh penalty for commission of the acts in question."

United States ex rel. Carmona v Ward, ___ F Supp ___, 21 CrL 2475 (S.D.N.Y., 1977), app. pending (CA2, Docket No. 77-2110).

b. APPLICATION

1. HISTORICAL BACKGROUND.

The 19th century in this country saw the opiates conveniently and inexpensively dispensed by physicians, drug, grocery, and general stores, and in the countless patent medicines as teething syrups, pain killers, cough syrups, aids for diarrhea, menstrual discomfort, menopausal stress, etc.⁶ Known for its calming effect and relief of pain, opium was referred to by physicians as "G.O.M." - "God's Own Medicine", and was often used by them to convert alcoholics to morphine because it was healthier, less expensive, and calmed the user instead of making him violent as alcohol did.⁷

Most opium users of the last century were upper and middle class women between 25 and 50 years old, who used it for menstrual cramps, to relieve the stresses of menopause, and for pleasure at home because the use of alcohol by women in public was disreputable.⁸

Although nonmedicinal use of opiates for pleasure was considered unrespectable and immoral by some, there was little popular support for legal prohibition

⁶Edward M. Brecher & the editors of Consumer Reports, Licit and Illicit Drugs; The Consumer Union Report on Narcotics, Stimulants, Depressants, Inhalants, Hallucinogens, and Marijuana--including Caffeine, Nicotine and Alcohol (Little, Brown & Co., Boston, 1972), p.3.

⁷Id., pp. 8-11.

⁸Id., pp. 17-20.

because the opiates were not viewed as a menace to society.⁹

The roots of the first anti-opium laws were racist, rather than health or safety, manifesting the anti-Chinese hostility growing out of the hordes of cheap Chinese labor brought into the country in the mid-19th century to build the railroads. By 1875, when white men and women began smoking opium side by side with the Chinese in a life-style which was widely disapproved, cities began passing ordinances outlawing the opium smoking houses or dens, although not outlawing opium itself.¹⁰ In 1887, Congress prohibited the importation of opium by Chinese and, in 1890, limited the manufacture of smoking opium to American citizens.¹¹

The 1906 Pure Food and Drug Act required that medicines be labeled, identifying any opiates in them, and that the drugs meet official standards of identity and purity, thereby serving to safeguard addicts and others.¹² Largely as a result of the economic interests of American traders, the opium wars between

⁹Id., pp. 6-7.

¹⁰Id., pp. 42-43.

¹¹Id., p. 44.

¹²Id., p. 47.

Britain and China, and America's inheriting the Spanish system of licensing and supplying narcotics addicts in the Philippines, President Theodore Roosevelt called for an international opium conference in 1906, out of which came the Hague Convention of 1912, designed to bring narcotics under international regulations, with orderly marketing and no cut-rate competition.¹³

The Harrison Narcotic Act of 1914 was passed to implement this Convention, the chief proponent being William Jennings Bryan, the great prohibitionist, fundamentalist, and anti-evolutionist Secretary of State. The Congressional debates contain little about the evils of narcotics addiction, and the bill did not appear to be a prohibitionist bill; on its face, it merely provided for the orderly marketing and licensing of opiates over the counter in small quantities and by prescription in larger quantities. However, the provision specifically permitting a physician to prescribe opiates "in the course of his professional practice only" was interpreted by law-enforcement officers to mean that doctors could not prescribe opiates to an addict to maintain his addiction, since addiction was not

¹³Id., p. 48.

considered to be a disease.¹⁴ Many physicians were imprisoned and the rest of the profession quickly dropped this practice, but not without protest.¹⁵ In 1915, an editorial in American Medicine was already reporting that the addict "is denied the medical care he urgently needs, open, above-board sources... are closed to him, and he is driven to the underworld where he can get his drug.... afflicted individuals are under the control of the worst elements of society."¹⁶

The Harrison Narcotic Act cut off the supply of legal opiates to addicts, thereby withdrawing the protection of the Pure Food and Drug Law, opening the door to adulterated, contaminated, misbranded, outrageously expensive black-market narcotics, particularly heroin, and resulting in deteriorating health, behavior, and status of addicts. Popular belief that this deterioration was due to the conversion of addicts from morphine to heroin after 1914, and that heroin must therefore be a very damaging drug, led in 1924 to the prohibition of the importation of heroin altogether, even for medicinal use.¹⁷

Although narcotics addicts were not regarded as criminals before vigorous

¹⁴Id., pp. 48-50. For a detailed history of this interpretation of the act by law-enforcement officials and the courts, including the subsequent reversal of itself by the U.S. Supreme Court, see Rufus G. King, "The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick", 62 Yale L J 737, 739-48 (1953).

¹⁵Licit and Illicit Drugs, supra, pp. 48-50.

¹⁶Id., p. 50.

¹⁷Id., pp. 47, 51.

enforcement of the Harrison Act began,¹⁸ and had participated fully in the life of the community,¹⁹ criminal activity shortly thereafter became associated with them because of the necessity of resorting to crime to pay the vastly inflated prices of black-market drugs.²⁰ Within 8 years of the Act's passage, a member of the English Rolleston committee observed that:

"...without curtailing the supply of the drug it has sent the price up tenfold, and this has had the effect of impoverishing the poorer class of addicts and reducing them to a condition of such abject misery as to render them incapable of gaining an honest livelihood."²¹

When crime began to rise and the black-market drugs continued to flourish, the federal and state governments responded by stiffening the penalties. When high maximum sentences failed to work, the legislators blamed softhearted judges and enacted high mandatory minimum sentences. When that failed, legislators blamed softhearted parole boards and deprived narcotics offenders of eligibility for parole. The increased penalties did not even make a dent in the heroin supply, but it did result in one major accomplishment: the price of heroin was driven from \$20.00 and \$50.00 per ounce in the early '20's to \$3,000.00 per

¹⁸King, "The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick", *supra*, 62 Yale LJ at 737.

¹⁹Licit and Illicit Drugs, *supra*, p. 6.

²⁰Id., p. 52.

²¹Id., p. 121.

ounce in 1952 (when it was still selling at \$100.00 per ounce in Turkey);²² and when prices increase, addicts simply have to steal more.^{22a}

The 1960's saw penalties lowered and the use of alternative civil commitment procedures introduced. However, in 1973, in what was widely regarded as a politically inspired move, former Gov. Rockefeller rejected the recommendations of his own legislative study commission²³ ignored the memorandum by that commission's chief counsel advising the governor that his proposal was unwise and probably unconstitutional,^{23a} and submitted to the legislature what he termed the "toughest drug law in the country",²⁴ subsequently issuing a "palpably false 'message or necessity'" to permit hasty passage and avoid full debate of his 3-week-old modified drug bill.^{24a}

²² Id., pp. 56-59. See, to the same effect, Commission to Study and Review the Penalty Provisions of the New Jersey Controlled Dangerous Substances Act and to Study the Nature and Scope of the State's Drug Treatment Programs, referred to as the N.J. "Drug Study Commission", First Report to the Legislature (Oct., 1974), p. 168. In 1971, Turkish farmers were getting less than \$1.00 per ounce of raw opium. Commission of Inquiry Into the Non-Medical Uses of Drugs (Canadian Govt.), Final Report (Information Canada, Ottawa, 1973), p. 565.

^{22a} Licit and Illicit Drugs, supra, pp. 56-59.

²³ Interim Report of the Temporary State Commission to Evaluate the Drug Laws; Proposed New York State Controlled Substances Act and Revision of Article 220 of the Penal Law (State of New York, 1972) (Legislative Document No. 10), p. 68, recommending retention of class C felony status for the sale of narcotics, except where the sale is to a person under 18 (class B) or is of more than 16 ounces (class A) without plea bargaining restrictions.

^{23a} NYT, Jan. 11, 1973, p. 1, c. 2.

²⁴ See former Gov. Rockefeller's annual message to the legislature, Jan. 3, 1973, in 2 McKinney's 1973 Session Laws of New York 2309, at 2317-20.

^{24a} Editorial, "Handcuffing the Police", N.Y.T., May 5, 1973, p. 38, c.2.

Indeed, the New York Court of Appeals, although declining to invalidate the new drug laws, said that it does not necessarily approve or concur in the legislature's judgment of the value of these sanctions. "Their pragmatic value might well be questioned," said the court, "since more than a half-century of increasingly severe sanctions has failed to stem, if indeed it has not caused, a parallel crescendo of drug abuse..." "Perhaps," lamented the court, "only time will tell whether the course pursued will prove effective or will fail as every similar effort since the Harrison Act of 1914 has failed."²⁵ After 61 years of failure, it would appear that time has already told.

²⁵People v Broadie, 37 NY2d 100, 117-18, 371 NYS2d 471, 481-82 (1975).

2. MEDICAL EFFECTS OF THE OPIATES (INCLUDING HEROIN)

a. PERMANENT EFFECTS.

The major reason for not taking opiates is that they can be enslaving. Most addicts continue to take opiates even though they want to stop, decide to stop, try to stop, and actually succeed in stopping for periods of time, despite the threat or experience of long-term imprisonment.²⁶ Addicts find it virtually impossible to permanently release themselves from the drug, not only because of the well known severe withdrawal symptoms,²⁷ but because of the permanent postwithdrawal syndrome of anxiety, depression, and craving.²⁸ No permanent cure has yet been found.²⁹

There is, however, no scientific evidence that lifetime addiction to the opiates causes any physical or mental deterioration. In this conclusion, there

²⁶Licit and Illicit Drugs, supra, pp. 84-85. About 1/4 to 1/2 of those in high-risk populations who try heroin become dependent. 2d Report of Nat'l Commission on Drug Abuse, p. 144; Canadian Commission of Inquiry, Final Report, supra, p. 320.

²⁷Licit and Illicit Drugs, supra, p. 65.

²⁸Id., p. 71, saying that: "The high rate of relapse even after prolonged incarceration and treatment can readily be explained in terms of the postwithdrawal syndrome--anxiety, depression and craving....Prolonged incarceration may postpone the drug-seeking behavior but it does not alleviate that underlying syndrome. Release from prison and from treatment may thereafter trigger an intense new wave of anxiety, depression, and craving--followed by drug-seeking behavior and relapse."

²⁹Id., pp. 64-89. However, a chemical recently found in the pituitary gland and synthesized, beta endorphin, is an opiate-like substance, possibly non-addictive, which has been used with promising results in treating severe pain and the symptoms of narcotic withdrawal. The compounds are considered likely to be involved in the body's natural mechanisms for dealing with pain, and it is possible that a natural shortage of the chemicals in some persons may make them unusually susceptible to drug addiction. Harold M. Schmeck, "Opiate-Like Substance in Gland Shows Promise as Pain Reliever", New York Times, Dec. 12, 1977, p. 22, c. 4.

is unanimous agreement among the national commissions in this country and Canada which have studied the problem the United Nations Commission on Narcotic Drugs, medical texts, and other serious studies.³⁰

Studies have shown that prolonged addiction to opiates produces no physical deterioration or impairment of physical fitness, no weight loss, no measurable organic disease.³¹ Studies have also shown that, in marked contrast to the prolonged and heavy use of alcohol, opiate addiction causes no brain damage, psychosis,

³⁰Id., pp. 21-27, and studies cited; James v. DeLong, "The Drugs and Their Effects", Staff Paper No. 1 in Dealing with Drug Abuse; A Report to the Ford Foundation (Preager, N.Y., 1972) (referred to as Ford Foundation Report), pp. 62-122, at p. 74; John C. Ball & Carl D. Chambers, ed., The Epidemiology of Opiate Addiction in the United States (Chas. C. Thomas Pub., Springfield, Ill., 1970), p. 305; Drug Use in America; Problem in Perspective; Second Report of the National Commission on Marijuana and Drug Abuse (Mar., 1973, Govt. Print. Off., Wash., D.C., 1973) (referred to as 2d Report of Nat'l Commission on Drug Abuse), pp. 21-22. Canadian Commission of Inquiry, Final Report, supra, p. 309. Louis G. Goodman & Alfred Gilman, eds., The Pharmacological Basis of Therapeutics, pp. 286, 244-45.

³¹See authorities cited in n. 30, supra.

For example, a study of 31 patients who, over a 32-year period, were most frequently hospitalized at the Public Health Service's Addiction Research Center and Hospital at Lexington for opiate addiction showed that 28 were still in average or fair medical condition for their age after a lifetime of opiate addiction. The illness of the 3 other patients was not attributable to drug use. No physical or mental deterioration was noted from a lifetime of addiction. Ball & Chambers, The Epidemiology of Opiate Addiction in the United States, supra, p. 305.

A study of 861 male addicts in the narcotics wards of the Philadelphia Gen. Hosp. during the 1920's made under the auspices of the Rockefeller-financed Comm. on Drug Addictions of the Bureau of Social Hygiene and the Philadelphia Comm. for the Clinical Study of Opium Addiction concluded that: "morphine addiction is not characterized by physical deterioration or impairment of physical fitness aside from the addiction per se. There is no evidence of change in the circulatory, hepatic, renal or endocrine functions. When it is considered that these subjects had been addicted for at least five years, some of them for as long as twenty years, these negative observations are highly significant." Licit and Illicit Drugs, supra, pp. 22.23.

or intellectual deterioration.³² Moreover, it is not evident that personality weaknesses are aggravated by addiction as such, although years of crime, prison, unemployment, anti-social hostility, and society's anti-addict hostility could have such an effect.³³ One report noted that most addicts were very likeable, friendly, cooperative, interested and eager to talk freely and frankly about themselves, and that many of them had sensitive minds.³⁴ The Second Report of the National Commission on Marijuana and Drug Abuse³⁵ concluded that:

"Of the drugs which are most commonly associated with dependence or drug-induced behavior, alcohol produces the most clearly established and reproducible brain pathology. Cocaine, amphetamines and other stimulants, heroin and morphine-like drugs, and cannabis do not appear to have this effect...heavy tobacco smoking is associated with greatly increased risk of lung cancer. If the standard for social policy were potential injury to individual health, barbiturates, alcohol, and tobacco would present the clearest cases for prohibition."

The Appellate Division's justification of class A felony treatment of the sale of heroin on the ground that it is "an essentially violent act, per se" which may be considered "as serious as murder because it condemns the addict to a life more horrendous than death",³⁶ is an unfounded restatement of popular myth which

³²Licit and Illicit Drugs, supra, pp. 25-27.

³³Id., p. 26.

³⁴Id., pp. 26-27.

³⁵2d Report of Nat'l. Commission on Drug Abuse, supra, pp. 21-22.

³⁶People v McNair, 46 AD2d, 476, 481, 363 NYS2d 151, 157 (4th Dept., 1975).

completely ignores the detailed and unrefuted data in this brief about the medical, psychological, sociological, and criminogenic effects of heroin, and ignores our judicially approved traditional value that human life, no matter how miserable, is of the highest value and is in a different realm from death.³⁷ As noted by the N.Y. Court of Appeals, "Metaphors cannot appropriately be used to justify a conclusion which would follow logically only if the metaphor were not a figure of speech but an accurate description."³⁸

We do not contend that heroin does not cause serious problems to the addict and, under present laws, to society, but those problems hardly reach the magnitude of murder, death, torture, bombings or vicious assaults.

³⁷See, for example, People v Roberts, 178 N.E. 690 (Mich., 1920), prohibiting euthanasia, Williams v New York 18 NY2d 481 (1966), barring actions for "wrongful life"; and Biddle v Perovich, 274 US 480, 487 71 LEd 1161, 1164 (1927), recognizing that, "By common understanding imprisonment for life is a less penalty than death".

³⁸People ex rel. Frisament v Brophy, 287 NY 132, 137 (1941).

b. "OVERDOSE".

One chapter of Consumer Reports' Licit and Illicit Drugs is devoted to proving that the thousands of deaths attributed to heroin overdose since the 1940's are not due to heroin overdose at all.³⁹ Around 1943, coroners and medical examiners began the practice (which still continues) of labeling as "heroin overdose" all deaths from unknown causes where the victim was a heroin addict who had used heroin prior to death and where there was no evidence of suicide, violence, infection, or other natural cause. These determinations are made without the benefit of an autopsy analyzing the quantity of drugs present.⁴⁰

Almost none of the reported deaths could be due to overdose. It is estimated that it would take about 50 N.Y.C. bags full of heroin, administered in a single injection to kill an unaddicted person. Virtually all "overdose" deaths are of addicts, and neither enormous amounts nor sudden increases in dosage of heroin kill addicts. Injections of 40 and 50 times the usual N.Y.C. daily dose can be administered to an addict without even making him sick.⁴¹

³⁹Licit and Illicit Drugs, supra, Ch. 12, pp. 101-14.

⁴⁰Id., pp. 105-06.

⁴¹Id., p. 104. See also, Canadian Commission of Inquiry, Final Report, supra, p. 313.

Not only are there no scientific papers in U.S. medical literature reporting that heroin overdose, as established by any reliable method, is a cause of death among addicts,⁴² but the suddenness of death and massive pulmonary edema associated with most reported cases are totally uncharacteristic of death by overdose, which is a very slow process lasting as long as 12 hours⁴³, and which can immediately be prevented by administering Nalline, which is stocked in all pharmacies and hospital emergency rooms.⁴⁴

While no theory has been proved--only because no theory has experimentally been tested--there is substantial evidence to believe that most "overdose" deaths are due to one of two causes: (1) The only comparable drug to heroin which causes the rapid death with pulmonary edema commonly associated with these deaths is quinine. Quinine was introduced as an adulterant of heroin after a 1939 epidemic of malaria hit addicts by contaminated injection needles, and has continued to be used because it contributes to the "rush" and because the black-market traffickers

⁴²Licit and Illicit Drugs, supra, p. 105.

⁴³Id., pp. 106-09; Canadian Commission of Inquiry, Final Report, supra, pp. 313-14.

⁴⁴Licit and Illicit Drugs, supra, p. 102; Canadian Commission of Inquiry, Final Report, supra, p. 313. Goodman & Gilman, The Pharmacological Basis of Therapeutics, supra, pp. 252, 264-69.

discovered that its bitter made it impossible for addicts to gauge the concentration of heroin in the bag by tasting the mixture. (2) It is known that morphine (also an opiate) in therapeutic doses equivalent to the ordinary heroin dosage causes death in people whose blood alcohol level ranges from 0.22 to 0.27% and also in people who are intoxicated on barbiturates and related drugs. A review of the toxicology reports on addict deaths in N.Y.C. in 1967 showed that almost half had alcohol in their blood. It is also known that many addicts turn to alcohol when deprived of their opiate supply or when trying to withdraw, and that if an opiate supply then shows up, they shoot up while still drunk.⁴⁵

⁴⁵Licit and Illicit Drugs, supra, pp. 111-14; Canadian Commission of Inquiry, Final Report, supra, pp. 310, 314-15.

c. TEMPORARY EFFECTS.

As with alcohol, psychoactive drugs, including the opiates, have a wide range of effects, depending on the person, his expectations and desires, society's attitudes, the social context, the dosage, the route of administration, and many other circumstances.⁴⁶

The opiates act primarily as a tranquilizer and pain reliever. They block the transmission of pain without a loss of sensation or feeling, and also alleviate the fear of pain, anxiety about pain, and physical and emotional reactions to pain.⁴⁷ Part of the tranquilizing effect is to calm the user and reduce aggressive and violent impulses--the opposite effect from that produced by alcohol.⁴⁸

Because of these analgesic and tranquilizing qualities and because heroin is 2 to 6 times stronger than morphine and less likely to cause nausea, heroin is often the preferred drug in England for relieving the intense pain of terminal cancer, coronary thrombosis, shingles, post abdominal operation pain, and severe burns, especially of children.^{48a}

⁴⁶Id., pp. xi, 28; 2d Report of Nat'l Commission on Drug Abuse, supra, p.24.

⁴⁷Licit and Illicit Drugs, supra, pp. 8-12; 2d Report of Nat'l. Commission on Drug Abuse, supra, p. 161; Ford Foundation Report, supra, p. 73, saying that the user can still feel the pain and can tell how great it would be without the drug, but is not "bothered" by it. Canadian Commission of Inquiry, Final Report, supra, p. 308. Goodman & Gilman, The Pharmacological Basis of Therapeutics, supra, pp.239-41.

⁴⁸Licit and Illicit, supra, pp.8-10; 2d Report of Nat'l Commission on Drug Abuse, supra, p. 270. D. Blaine, Louis P. Bozzetti & Kjell E. Ohlson, "The Narcotic Analgesics: The Opiates", in the Appendix, Vol. 1, of the Technical Papers of the 2d Report of Nat'l Commission on Drug Abuse, pp.60-83; President's Commission, Task Force on Narcotics and Drug Abuse, supra, (off.ed.), p.222, (Avon Bks.ed.)p.509. Canadian Commission of Inquiry, Final Report, supra, p.308.

^{48a}Horace Freeland Judson, Heroin Addiction in Britain; What Americans Can Learn from the English Experience (Harcourt, Brace Jovanovich, New York, 1974), pp.7-10 and medical journal citations at pp. 167-68.

A pleasant, brief euphoria is also caused in some people, but not everyone and not at all times. New users often experience mild anxiety and nausea instead.⁴⁹

Opiate use does not induce paranoid behavior.⁵⁰ However, because of the brief period of action of the drug, the addict must take it 2 to 4 times a day to forestall withdrawal symptoms. Those whose supply is uncertain may therefore tend to "bounce" from a satisfied to an incipient withdrawal state several times a day.⁵¹

While under the influence of opiates, one does have some mental clouding, characterized by drowsiness, an inability to concentrate, and lethargy, reduced visual acuity at night, constipation, temporary reduction of sexual desire, and profuse perspiration, but not slurred speech or significant motor incoordination.⁵²

Delayed menstruation is a common effect of opiate addiction, as is a lessened likelihood of pregnancy. The high incidence of maternal complications suffered by pregnant addicts is also associated with poverty, malnutrition, infection and lack of prenatal care. The effect of opiates on babies born to addicted mothers is somewhat uncertain.⁵³

⁴⁹Licit and Illicit Drugs, supra, pp.12-16; Ford Foundation Report, supra, pp.78; 2d Report of Nat'l Commission on Drug Abuse, supra, p. 161; Canadian Commission of Inquiry, Final Report, supra, pp.307-08.

⁵⁰Ford Foundation-Report, supra,p.78; 2d Report on Nat'l Commission on Drug Abuse, supra, p. 161.

⁵¹Ibid.; Licit and Illicit Drugs, supra, pp.28-32.

⁵²Licit and Illicit Drugs, supra, pp.31-32; Canadian Commission of Inquiry, Final Report, supra, pp.308-09.

⁵³Licit and Illicit Drugs, supra, pp.29-31; Canadian Commission of Inquiry, Final Report, supra, p.318.

d. EFFECTS ATTRIBUTABLE TO CRIMINALIZATION OF HEROIN
& TO LIFE STYLE.

The physiological hazards of heroin and other opiates per se are minimal-- much less serious than those of alcohol or tobacco. Addicts do, however, suffer from a variety of conditions ancillary to their general life style and to the criminalization of narcotics and narcotic paraphernalia.⁵⁴ In fact, almost all of the worst consequences ordinarily attributed to the opiates are directly traceable instead to the narcotics laws.⁵⁵

The Harrison Narcotic Act of 1914 and its enforcement completely cut off the addict from any legal supply of opiates and withdrew the protection of the 1906 Pure Food and Drug Act which had required, among other things, that the drugs be labeled as to kind and quantity and meet official standards of identity and purity.⁵⁶ As a result, addicts have been forced to purchase adulterated, contaminated, misbranded black-market narcotics containing highly dangerous mixtures of small amounts of heroin and large amounts of poisonous adulterants, including quinine.⁵⁷

⁵⁴Ford Foundation Report, supra, p. 74.

⁵⁵Isidor Chein, Donald L. Gerard, Robert S. Lee, and Eva Rosenfeld, The Road to H; Narcotics, Delinquency and Social Policy, (Basic Books, Inc., N.Y., 1964), p. 327; Licit and Illicit Drugs, supra, p. 22; Canadian Commission of Inquiry, Final Report, supra, pp. 309-10.

⁵⁶Licit and Illicit Drugs, supra, p. 47.

⁵⁷Ibid.; Chein, The Road to H; Narcotics, Delinquency, and Social Policy, supra, p. 349.

The arrest of many physicians under the interpretation of the Harrison Act which prohibited them from prescribing narcotics to addicts, drove most doctors away from addicts.⁵⁸ Private physicians are often afraid to treat addicts, even for ailments other than addiction, and shunt them off to overly crowded public clinics.⁵⁹

The black-market prices of the opiates leave the addict poverty stricken, with all the health consequences which normally flow from that condition. For example, the narcotics addict is usually portrayed as emaciated, but addicts who take up to 30 times the normal dosages with ready access to hospital food eat well and maintain perfectly normal weight. The emaciated addict is the one who starves himself to save money for the outrageously priced black-market drugs. The addict is able to bear near starvation more easily than others because of the tranquilizing effect of the drug. For the same reason, addicts sometimes suffer from anemia, have sallow complexions and rotten teeth. The opiates enable the addict to bear toothaches and painful diseases without complaint.⁶⁰

⁵⁸Licit and Illicit Drugs, supra, p. 50.

⁵⁹Chein, The Road to H; Narcotics, Delinquency and Social Policy, supra, pp. 349-50.

⁶⁰Licit and Illicit Drugs, supra, pp. 23-24, 31; Canadian Commission of Inquiry, Final Report, supra, p. 310.

The exorbitant prices of the drug and the life style of crime and poverty that necessarily accompany it for most addicts is one cause of a high suicide rate.⁶¹ Venereal disease reflects the occupational hazard of the many females who earn their drug money through prostitution.⁶²

The illegality of narcotics and narcotic implements also often forces addicts to take their drugs under unhygienic conditions.⁶³ When opiates are cheap, addicts generally eat, sniff, or smoke them. When they are expensive, however, as in this country, the same effects are produced with much smaller amounts of the drug by injecting them subcutaneously ("skin popping") ~~or intravenously~~ ("mainlining"). The laws which make it a crime to possess or sell needles, syringes, and other narcotic paraphernalia without a prescription, contributes to disease in two ways: (1) Injections are often made with crude and unsterile implements, thus contributing to the risk of infectious diseases. (2) Addicts often minimize the risk of arrest by sharing their injection equipment, thereby inviting crossinfection.⁶⁴

⁶¹Licit and Illicit Drugs, supra, p. 101.

⁶²Ibid.

⁶³Chein, The Road to H; Narcotics, Delinquency, and Social Policy, supra, pp. 349-50.

⁶⁴Licit and Illicit Drugs, supra, pp. 22, 101; Canadian Commission of Inquiry, Final Report, supra, pp. 309-10.

3. EFFECTS ON SOCIAL PRODUCTIVITY OF ADDICTS.

The New York Court of Appeals noted that drug addiction degrades and impoverishes those whom it enslaves, debilitating the addicts and disrupting their families.⁶⁵ The purpose of this and subsequent sections of the brief is to show that opiate addiction per se has none of these effects, that present rehabilitation programs have greatly minimized these effects, and that such of these effects as do exist for American addicts are caused by the criminalization of opiates, the stiff penalties for possession and sale, and the absence of a heroin maintenance program.

The criminalization of narcotics has a disastrous effect on the social productivity of addicts. It forces the addict to deal with a complex, black-market distribution system designed to enable each participant to deal with only a few known and trusted people to minimize the risk of arrest.⁶⁶ Black-market prices place heroin beyond the average addict's capacity for legitimate income, driving him into criminal activities.⁶⁷ Because of the brief period of action of the opiates, an addict must take the drug from 2 to 4 times a day to forestall withdrawal symptoms.⁶⁸ The combination of these factors results in the typical street addict being forced to sacrifice law-abiding work, life and associates to the all-absorbing preoccupation with maintaining his contacts and standing with his illegal supply sources and engaging in criminal activity to get enough money to buy the drugs.⁶⁹

⁶⁵People v Broadie, 37NY2d 100, 113, 371 NYS2d 471, 477, (1975).

⁶⁶Licit and Illicit Drugs, supra, p. 98.

⁶⁷Chein, The Road to H; Narcotics, Delinquency and Social Policy, supra, pp. 349-50; President's Commission Task Force on Narcotics and Drug Abuse, supra, (off.ed.), p. 222, (Avon Books, ed.) p. 509; Licit and Illicit Drugs, supra, pp. 52, 58, 121; 2d Report of Nat'l Commission on Drug Abuse, supra, pp. 162, 1975.

⁶⁸Licit and Illicit Drugs, supra, p. 32;

⁶⁹Chein, The Road to H; Narcotics, Delinquency and Social Policy, supra, pp. 349-50.

A British Columbia report⁷⁰ vividly describes why the addict has no time for regular employment or other socially useful work:

"The activities of the drug addict become a full-time job. Formerly living with no real objective, with indolence and unemployment perhaps intimately related, the addict now finds he has to hustle. If he is going to use drugs steadily he must find each day, by illegal means, the funds for the purchase of his drugs. This usually involves daily thieving, the sale to a "fence" or to beer parlor habitues...of the goods he has stolen, the locating of a drug peddler, negotiating for his supply, then the actual securing of the drugs at a designated time and place, followed by the locating of a presumably secure place where he can inject his drugs and rest and relax for several hours after the injection. He may take his last injection of the day at midnight, having in reserve a supply for his first "fix" the following morning on awakening. A program such as this keeps the addict busy all day. He has no time for boredom. He has barely time enough after each injection to enjoy the effects before he may have to start another phase of his cycle. In other words, the addict now has a job, a full-time job...not governed by regular hours as is most legal employment."

Although a person is likely to be somewhat lethargic while under the influence of opiates,⁷¹ he is certainly not rendered incapable of exacting, challenging work. As described in another report about heroin addicts in New York City,⁷²

⁷⁰George H. Stevenson et al, "Drug Addiction in British Columbia: A Research Survey" (Univ. of British Columbia, 1956) (unpublished), pp. 396-97, quoted in Licit and Illicit Drugs, supra, p. 40.

⁷¹Licit and Illicit Drugs, supra, pp. 31-32.

⁷²Preble and Casey, "Taking Care of Business", International Journal of the Addictions (Mar. 1969), pp. 2-3, quoted in Licit and Illicit Drugs, supra, pp. 40-41.

addicts are:

"actively engaged in meaningful activities and relationships seven days a week. The brief moments of euphoria after each administration of a small amount of heroin constitute a small fraction of their daily lives. The rest of the day they are aggressively pursuing a career that is exacting, challenging, adventurous, and rewarding. They are always on the move and must be alert, flexible, and resourceful. The surest way to identify heroin users in a slum neighborhood is to observe the way people walk. The heroin user walks with a fast, purposeful stride, as if he is late for an important appointment--indeed, he is. He is hustling (robbing or stealing), trying to sell stolen goods, avoiding the police, looking for a heroin dealer with a good bag (the street retail unit of heroin) coming back from copping (buying heroin), looking for a safe place to take the drug, or looking for someone who beat (cheated) him--among other things. He is, in short, taking care of himself in business, a phrase which is so common with heroin users that they use it in response to words of certain greeting, such as "how you doing?" and "what's happening?" Taking care of biz is the common abbreviation. Ripping and running is an older phrase which also refers to their busy lives. For them, if not for their middle and upper class counterparts (a small minority of opiate addicts), the quest for heroin is the quest for a meaningful life, not an escape from life. And the meaning does not lie, primarily, in the effects of the drug on their minds and bodies; it lies in the gratification of accomplishing a series of challenging, exciting tasks, every day of the week."

The National Commission of Drug Abuse correctly concluded that prohibition (rather than heroin itself) increases the level of dependence because of the "hustle" necessary to obtain the drug and increases the adverse social impact of use.⁷³

On the other hand, Dr. Jerome H. Jaffe--now Director of President Nixon's Special Action Office for Drug Abuse Prevention--said in a 1970 medical text that: "The addict who is able to obtain an adequate supply of drugs through legitimate channels and has adequate funds, usually dresses properly, maintains

⁷³2d Report of Nat'l Commission on Drug Abuse, supra, p. 143. The Commission also noted that in Hong Kong and Thailand, where heroin is available and inexpensive, chronic users amount to about 10% of the adult population--the same percentage as chronic users of alcohol in this country. In this country, at the turn of the century, when opiates were easily available and inexpensive, chronic users never exceeded 1% of the adult population. Id., pp. 142-43

his nutrition, and is able to discharge his social and occupational obligations with reasonable efficiency. He usually remains in good health, suffers little inconvenience, and is, in general, difficult to distinguish from other persons."⁷⁴ Other studies confirm these conclusions.⁷⁵ Further confirmation comes from the tens of thousands of members of the U.S. armed forces who became addicted to heroin in Vietnam during 1970 and 1971. Despite the large daily doses, they continued to perform their military duties without detection, and sometimes with distinction, and were indistinguishable to their superior officers from the non-addicted personnel.⁷⁶

⁷⁴Louis S. Goodman & Alfred Gilman, eds., The Pharmacological Basis of Therapeutics (Macmillan, N.Y., 1970)(4th ed.), p. 286.

⁷⁵Dr. Marie Nyswander reports that when in East Harlem addict occasionally locates a physician who will give him the drugs, he is likely to keep a job, maintain his family intact, and cut out his criminal activity. No social deterioration is noted among middle-class and wealthy addicts who can often get narcotics from their physicians, Licit and Illicit Drugs, supra, p. 38.

The Ad Hoc Panel on Narcotic and Drug Abuse of President Kennedy's 1962 White House Conference on Narcotic and Drug Abuse indicated that "a significant number of persons in the higher socioeconomic classes regularly receive narcotic drugs without detection or apprehension by enforcement agencies." Ibid.

Dr. John A. O'Donnell's 1969 study, "Narcotics Addicts in Kentucky", noted an improvement in work pattern of some addicts following the securing of a stable legal source of drugs from a physician, but said that others remained unemployed or poorly employed, suggesting that legal opiates are not a panacea, but do permit an improvement in employment, otherwise not available. Id., p. 132. See also Canadian Commission on Inquiry, Final Report, supra, p. 308.

⁷⁶Licit and Illicit Drugs, supra, p. 39.

As an illustration, it is noteworthy that Dr. William Stewart Halstead (1852-1922), known as "the father of modern surgery" was a morphine addict taking a minimum daily dosage of 180 milligrams (18 times the average N.Y.C. dose).⁷⁷ He was given only a minor appointment at Johns Hopkins Hospital in 1886 because his addiction was known, even though he had already begun a promising career and had discovered the first local anesthesia, but performed so brilliantly that he was soon made chief of surgery. His precision, skill and ingenuity as a surgeon during his years of addiction, including developing measures to keep germs out of the wound during surgery, earned him international renown.⁷⁸

⁷⁷Licit and Illicit Drugs, supra, pp. 330-35. The usual dose in a N.Y.C. bag is 10 milligrams of morphine. Id., p. 104.

⁷⁸Id., pp. 33-35.

4. CRIMINOGENIC EFFECTS.

a. GENERALLY.

Research studies have shown that, contrary to popular belief, criminal behavior is not the by-product of opiate addiction per se, but results, as does the drug dependence itself, from psychological and social deviance which predates dependence,⁷⁹ as well as from the black-market prices and forced criminal associations resulting from the criminalization of the drugs. Moreover, the crimes associated with opiate addicts are mostly of a non-violent character.

As is documented elsewhere in this brief,⁸⁰ crime was not associated with opiate addiction in pre-Harrison Act America or with addicts prescribed narcotics in America today, nor is crime associated with heroin addiction in England, where heroin maintenance is available at clinics for low cost or free.

⁷⁹2d Report of Nat'l Commission on Drug Abuse, supra, p. 172. "...most known opiate (primarily heroin) dependent persons had long histories of delinquent or criminal behavior prior to their being identified as drug users, that opiate use becomes a further expression of delinquent tendencies, and that most heroin-dependent persons, continue to be arrested subsequent to release from prisons, hospitals or treatment programs...In fact, opiate-dependent persons tended to escalate the seriousness of their offenses and to experience increased arrests over their pre-dependence rates, mostly for drug arrests and secondarily for crimes against property." Id., pp. 161-62.

Dr. Luther L. Terry, Surgeon General, U.S. Public Health Service, testified that "drug abuse is usually a symptom of some other underlying disorder, rather than the original cause of an addict's disabilities and alienation." "Civil Commitment and Treatment of Narcotic Addicts", Hearings before Subcom. No. 2 of the Comm. of the Judiciary, House of Representatives, 89th Congress, 1st & 2d Sess. (1965-66), p. 120.

See also Canadian Commission of Inquiry, Final Report, supra, p. 321.

⁸⁰See section on heroin maintenance in this brief, pp. 138-145.

Shortly after enforcement of the Harrison Act began, however, American⁸¹ and English⁸² physicians, as well as some police officials,⁸³ complained that prohibition had not curtailed narcotics, but had served only to shift their distribution from the medical profession to a vast, clandestine smuggling and black market system, to drive prices beyond the reach of legitimate income, and to force addicts to steal, turn to prostitution and become dope peddlers themselves to pay for their drugs and to associate with and come under control of the criminal element.

Merely supplying legal opiates to a professional criminal will not necessarily cause him to change his profession, but it will enable those who steal only to support their habit to lead law-abiding lives.

The profitability of the black market depends on continued law enforcement to keep out new competitors and to buttress the existing distribution system and its price-fixing effectiveness by holding the available supply down to the level of effective demand, thereby enabling the prices to be raised even higher.⁸⁴ When prices increase, addicts simply steal more.⁸⁵

⁸¹Licit and Illicit Drugs, supra, pp. 50-51.

⁸²Id., pp. 121.

⁸³Id., p. 52.

⁸⁴Id., pp. 93-93.

⁸⁵Id., p. 58.

The 1920's price of \$20.00 to \$50.00 per ounce of heroin had been driven up to \$3,000.00 per ounce by 1952, while still selling at \$100.00 per ounce in Turkey, from which most of the heroin comes.⁸⁶ The lowest 1970 estimate of the cost of heroin for a dependent person was \$7,300 per year.⁸⁷ Considering that 80% of N.Y.C.'s addicts reside in the urban slums and are relatively poor to begin with,⁸⁸ it is relatively impossible for them to support their habit and themselves and their families on any legitimate income, so they are driven into criminal activity.⁸⁹

As noted earlier, the opiates are tranquilizers which calm the user and reduce aggressive impulses and sexual desires--the very opposite of alcohol, which is strongly associated with violence and sexual aggression.⁹⁰ Partly because of this, violent offenses against the person are relatively uncommon

⁸⁶ Ibid. In 1971 Turkish farmers received less than \$1.00 per ounce of raw opium. Canadian Commission of Inquiry, Final Report, supra, p. 565.

⁸⁷ 2d Report of Nat'l Commission on Drug Abuse, supra, p. 175. See also Canadian Commission of Inquiry, Final Report, supra, p. 321, saying that heavy habit may cost \$15 to \$50/ day and higher.

⁸⁸ 2d Report of Nat'l Commission on Drug Abuse, supra, p. 174.

⁸⁹ Id., pp. 162, 175; President's Commission, Task Force on Narcotics and Drug Abuse, supra, (off. ed.) p. 222, (Avon Bks. ed.), p. 509; Chein, The Road to H; Narcotics and Delinquency and Social Policy, supra, pp. 349-50; Licit and Illicit Drugs, supra, pp. 52, 58, 121; Canadian Commission of Inquiry, Final Report, supra, p. 321.

⁹⁰ See this brief, pp. 50-51. (P)(a), pp. 45, 46.

among addicts⁹¹. The National Commission on Drug Abuse reported that the "... available evidence indicates that users of opiates are significantly less likely to commit homicide, rape and assault than are users of alcohol, amphetamines and barbiturates."⁹²

⁹¹President's Commission, Task Force on Narcotics and Drug Abuse, supra, (off.ed.), p.222, (Avon Bks.ed.), pp. 509-11, reporting that in N.Y.C. between 1963 and 1965, admitted drug (mostly heroin) users constituted 11 to 12 1/2% of all persons arrested for felony crimes against property, but only 2% of those arrested for felonies against the person.

The U.S. Bureau of Narcotics and Dangerous Drugs, Drug Enforcement Agency, commissioned a study by the Research Triangle Institute, in which almost 2,000 arrested persons in 6 cities (Chicago, Los Angeles, New Orleans, Brooklyn, San Antonio, and St. Louis) were interviewed during 1970 and 1971, given urine analyses, and given arrest records checks. 256 persons in the sample were shown to be current heroin users, 611 were non-drug users, and the remainder were users of 10 other types of drugs.

The following table shows the percentage of current heroin users in the sample who were arrested for various categories of offenses as compared with non-drug users, graphically demonstrating that the heroin users were much less likely than non-drug users to be involved in crimes of violence:

/table reprinted infra, on following page/

See, to the same effect, 2d Report of National Commission on Drug Abuse, pp. 162, 175; Jared Tinklenberg, "Drugs and Crime", Appendix, Vol. 1, The Technical Papers of the 2d Report of Nat'l Commission on Drug Abuse, supra, p. 242, at pp. 261-63; Testimony of Dr. Luther L. Terry, Surgeon General, U.S. Public Health Service, in "Civil Commitment and Treatment of Narcotic Addicts", Hearings before Subcomm. No. 2 of the Comm. of the Judiciary, House of Rep., 89th Congress, 1st & 2d Sess. (1965-66), p. 118, at p. 120.

⁹² 2d Report of Nat'l Commission on Drug Abuse, supra, pp. 162-63.

<u>Offense</u>	<u>Heroin Users</u>	<u>Non-drug Users</u>
<u>violent</u>		
homicide	1.6%	3.2%
forcible rape	0.4%	2.3%
aggravated assault	3.1%	11.5%
other assaults	1.6%	4.7%
Total	6.7%	21.7%
 <u>violent/non-violent</u>		
arson	0.0%	0.8%
robbery	18.7%	14.0%
weapons	7.0%	5.6%
sex offenses	0.8%	2.2%
Total	26.5%	22.6%
 <u>non-violent</u>		
burglary	28.1%	15.3%
larceny	17.2%	13.3%
auto theft	2.0%	5.5%
fraud	1.2%	1.2%
stolen property	2.7%	1.9%
vandalism	0.0%	1.4%
commercialized vice	0.0%	0.2%
narcotics	10.1%	8.5%
others	3.5%	6.3%
Total	64.8%	53.6%

Note should be taken that this table is based on arrests, not convictions and that it is based on "time samples" of the first 300 persons arrested for non-traffic offenses and brought to jail in each of the 6 cities on the dates the researchers were in those cities, and that the cities were studied at different times of the year. William C. Eckerman, James D Bates, J. Valley Rachel, and W. Kenneth Poole, Drug Usage and Arrest Charges; A study of Drug Usage and Arrest Charges Among Arrestees in Six Metropolitan Areas of the United States (Drug Control Div., Off. of Scientific Support, Bureau of Narcotics and Dangerous Drugs, U.S. Dept. Justice, Wash., D.C., Dec., 1971), Table VI-1, p.97; Table VII-2, p. 124; see also pp. 123-27; 144-51, 367-68, 377-78, 382-88.

(My thanks to Tom Wicker, of the New York Times, for bringing this study to my attention.)

to my attention.)
~~Section 62 of the 1962 Report of the National Commission on Drug Abuse, supra~~
~~pp. 162 x 175, stated: "Finkleberg, 'Drugs and Crime,' Appendix, 'The~~
~~Technical Aspects of the 1962 Report of the National Commission on Drug Abuse, supra, pp.~~
~~162 x 175 x 166-169, 'Testimony of Dr. Arthur L. Terry, Surgeon General, U.S. Public~~

Both the National Commission on Drug Abuse and the President's Task Force on Narcotics and Drug Abuse report that studies show that opiate addicts have to resort to crime to support their habits, and that most crimes committed for this purpose are non-violent, money-making crimes against property (especially burglary and shoplifting) pimping and prostitution, and selling drugs.⁹³

The New York Temporary State Commission to Evaluate the Drug Laws verified that most of the violent crime in New York is not being committed by addicts, and that "the type of criminal activity which appears to relish the infliction of terror and injury upon victims and of which the communities throughout the state and nation are most apprehensive does not have anything at all to do with heroin addiction."^{93a}

⁹³2d Report of Nat'l Commission on Drug Abuse, supra, pp.162, 175; Tinklenberg, "Drugs and Crime", Appendix, Vol. 1, The Technical Papers of the 2d Report, ect., supra; President's Commission, Task Force on Narcotics and Drug Abuse, supra, (off.ed.), p. 222, (Avon Books, ed.), pp. 509-11; see also testimony of Dr. Luther L. Terry, Surgeon General, In Hearings, etc., supra, at p. 120.

^{93a}The Commission said that the myth to the contrary is based partly on the mistaken notion that the large percentage of addicts in most prisons represents an accurate cross-section of the criminal population as a whole. The Commission suggests that addicts are overly represented in prison because their high visibility and constant surveillance makes them much easier to catch than other criminals. Furthermore, the Bur. of Narc. reports that up to 40% of all those arrested in large cities are "high" on drugs at the time of arrest, and the Commission notes that persons who are "high" at the time are easier to catch and arrest. N.Y. Temp. Comm. to Evaluate the Drug Laws "Employing the Rehabilitated Addict" (N.Y. State Legislature Doc. No. 10, 1973) pp. 9-10.

Even the estimates of nonviolent thefts were greatly exaggerated (although they remain substantial). Nelson Rockefeller estimated that in 1972 addicts stole \$6½ billion in New York alone,^{93b} but the McGlothlin report prepared for the Bureau of Narcotics estimates that less than \$3 billion was stolen by addicts in the entire country,^{93c} and F.B.I. statistics for that year put the national value of all thefts, burglaries, and robberies at only \$1.2 billion,^{93d} with less than a quarter of that being committed by drug users.^{93e}

The N.Y. Temporary State Commission to Evaluate the Drug Laws said that statistics relating addiction to crime frequently inflate and exaggerate addict-related crime, and noted a reliable survey which showed that 90% of all shoplifting in Washington D.C. retail stores is committed by non-addicts.^{93f}

Former Gov. Rockefeller's statement in support of his drug legislation--"The crime, the muggings, the robberies, the murders associated with addiction continue to spread a reign of terror"⁹⁴-- is simply a political hyperbole, contradicted by all the evidence known now and at the time he made it.

^{93b} "A perspective on 'Get Tough' Drug Laws" (Drug Abuse Council, Inc., Washington, D.C., 1973), p. 3.

^{93c} William McGlothlin, Victor A. Tabbush, Carl D. Chambers, and Kay Jamison, Alternative Approaches to Opiate Addiction Control: Costs, Benefits, and Potential (U.S. Dept. of Justice, Bur. of Narcotics and Dangerous Drugs, Wash. D.C., 1972), pp. 1, 3-4

^{93d} F.B.I. Uniform Crime Reports, 1972 (G.P.O., Wash. D.C., 1973), pp. 15-28.

^{93e} Speech by John Ingersoll, Director, Bur. of Narcotics and Dangerous Drugs, to Calif. Peace Officers' Assn. on May 24, 1972, cited in Judson, Heroin Addiction in Britain, supra, p. 134.

^{93f} N.Y. Temp. State Comm. to Eval. Drug Laws, rpt., "Employing the Rehabilitated Addict", supra, p. 9.

⁹⁴ See former Gov. Rockefeller's annual message to the legislature, Jan. 3, 1973, 2 McKinney's 1973 Session Laws of New York 2309, at 2318.

b. RECIDIVISM.

Much has been made⁹⁵ of former N.Y. Corrections Commissioner Russell G. Oswald's 1973 testimony before a joint session of the state legislature's Codes Committee when, in response to a question not within the scope of his invitation or his prepared remarks, he gave an offhand answer to the effect that narcotics felons have a 50% higher recidivism rate (60% to 65%) than other felons (40%)⁹⁶

⁹⁵Primary reliance was placed on this set of statistics by the N.Y. Appellate Division for the 4th Dept. in upholding the drug laws. People v McNair, 46 AD2d 476, 482, 363 NYS2d 151, 157-58 (4th Dept., 1975), affd., supra.

The Attorney General, on pp. 8-10, 28 of its brief before the N.Y. Court of Appeals in this case, relied on this testimony, characterizing it as "findings" of the legislature, which may not be questioned if fairly debatable. Such is not the case: (1) No report was issued by the Codes Committees and no legislative memorandum accompanied the drug legislation; (2) Testimony before a committee is not mysteriously converted into a legislative finding by virtue of the fact that it was testimony, anymore than my well received testimony before the same committee in 1975 may now be considered a legislative finding; (3) the only findings made at the time were those of the N.Y. Temporary State Commission to Evaluate the Drug Laws, and their findings were contrary to Oswald's testimony.

The Court of Appeals also relied heavily on the "legislative finding" of a high recidivism rate, without referring specifically to Oswald's statistics, People v Broadie, 37 NY2d 100, 114, 116, 371, NYS2d 471, 478, 480, (1975).

⁹⁶The following is the complete text of Oswald's testimony on the recidivism issue, taken from the Official Transcript, Joint Hearing by the Senate and Assembly Codes Committee on Drug Bills (S 6204, S 6205, A7328, A 7873) (O'Neill Reporting Co., White Plains, N.Y., 1973), 2d meeting, Feb. 6, 1973, p. 10:

Chairman Barclay: "Have you any idea what their recidivism rate is on the narcotic offenders?"

Commissioner Oswald: "It is greater than among the regular prison population. Probably in a five-year period it runs somewhere about 60 per cent to 65 per cent if we talk about recidivism as being returned to an institution during a five-year period. Then for the general population that kind of return amounts to about 40 per cent in a five-year period."

This offhand answer was not within the scope of Oswald's invitation or prepared remarks. He was invited by the committees for the sole purpose of testifying about the prison system's capacity to handle the expected large increase of prisoners and about the difficulties in handling large numbers of prisoners with life terms and no hope of parole (as was provided in the original bills). Official Transcript, Joint Hearing, supra, p. 5.

The first problem is that Oswald's offhand statistical estimate was dead wrong. The N.Y. Dept. of Correctional Services does not keep or publish recidivism statistics based on the type of offense for which a felon was originally committed,⁹⁷ but it does supply such data on a 10% random sampling of its parolees to the National Probation and Parole Institutes of the National Council on Crime and Delinquency Research Center, which publishes the Uniform Parole Reports.

As shown on the chart on the next page, both the national statistics. (based on the follow-up for two and three years of more than 21,000 male parolees, over 1,600 of whom were originally committed for narcotic offenses)⁹⁸ and the New

⁹⁷ See N.Y. Dept. of Correctional Services, Annual Statistical Report; Inmate and Parole Populations; 1973 Data (Dept. Corr. Serv., Albany, N.Y., 1974)

⁹⁸ Data for the national statistics is compiled by using 100% of the parolees in 40 states and samplings varying from 10% (including N.Y.) to 50% of the parolees in 10 other states. M.G. Neithercutt, Wm. H. Mosley, Ernst A. Wenk, Uniform Parole Reports: A National Correctional Data System (Nat'l. Council on Crime and Delinquency Research Center, Davis, California, 1975), pp. 20-21.

These are the most recent statistics available, as of Nov., 1975.

York statistics show that the recidivism rate for narcotic felons is consistently LESS than that of parolees generally,⁹⁹ and that 4/10ths of the new major offenses committed by the narcotic felons were for other narcotic offenses, as opposed to only 1/10th for other felons. The highest recidivism rates were consistently found in those parolees originally committed for robbery, burglary and theft of offenses.¹⁰⁰

⁹⁹The Uniform Parole Reports for New York are available only with special permission from Dr. John M. Stanton, Director, Office of Program Planning, Evaluation and Research, of the N.Y. Dept. of Correctional services. Permission was finally obtained in late October, 1975, and the reports are now available to counsel and the court at the office of counsel for the petitioner.

Permission was not given for the 2-and3- year follow-up data for New York because the sampling for those studies was too small.

¹⁰⁰National Probation and Parole Institutes, "Uniform Parole Reports" (national male and N.Y. male)(National Council on Crime and Delinquency Research Center, Davis, Calif.), Table I, Parole Outcome by Commitment Offense.

NATIONAL PAROLE OUTCOME - BY COMMITMENT OFFENSE

	<u>2 years after 1971 release</u>		<u>3 years after 1970 release</u>	
	<u>All Offenses</u>	<u>Narcotic Offenses</u>	<u>All Offenses</u>	<u>Narcotic Offenses</u>
Continued on parole	73%	79%	71%	76%
<u>Absconders</u>	5%	4%	4%	5%
<u>Return to prison for:</u>				
Technical violation without a new offense	9%	6%	11%	7%
Technical violation in lieu of prosecution or commitment for new minor offense	3%	2%	3%	3%
Technical violation in lieu of prosecution or commitment for new major offense	3%	2%	3%	3%
New major offense	7%*	6%**	8%*	6%**

NEW YORK PAROLE OUTCOME - BY COMMITMENT OFFENSE

	<u>1 year after 1971 release</u>		<u>1 year after 1972 release</u>	
	<u>All Offenses</u>	<u>Narcotic Offenses</u>	<u>All Offenses</u>	<u>Narcotic Offenses</u>
Continued on parole	76½%	79%	80½%	84%
<u>Absconders</u>	3%	7%	6%	6%
<u>Return to prison for:</u>				
Technical violation without a new offense	18%	14%	11%	10%
Technical Violation in lieu of prosecution or for new minor offense	1%	--	½%	--
Technical violation in lieu of prosecution or for new major offense	--	--	--	--
New major offense	4%	--	3%	--

- * 1/10th of new major offenses by parolees, generally are narcotic offenses.
 ** 4/10th of new major offenses by parolees committed for narcotic offenses
 are narcotic offenses.

Even had the legislature accepted as fact Oswald's erroneous recidivism statistics, to what extent could it rationally have used them to justify the monstrous drug laws it permitted to be created?

Oswald failed to break down his recidivism statistics into meaningful data:

Most second and subsequent arrests of narcotic felons are for further drug arrests--40%, according to both the F.B.I.¹⁰¹ and Uniform Parole Reports¹⁰² statistics--which would more than have accounted for the 20% to 25% higher re-arrest rate among that group as testified to by Oswald. Under the actual statistics, showing a lesser recidivism rate among narcotic felons than others, this means that the recidivism rate of narcotic felons, as it concerns non-narcotic crimes, is almost HALF that of other felons. Furthermore, of the non-drug offenses committed by heroin addicts, the vast majority are crimes against property.¹⁰³ These are the statistics alleged to have supported the conclusions that narcotics use has spread a "reign of terror" of violent crimes and that the recidivism rate is so high as to mandate life sentence to protect society.

¹⁰¹The F.B.I.'s 1966 "Careers in Crime Program", covering 12 years, showed that 40% of the offenses of the 4,400 persons identified as heroin users were for narcotic offenses. President's Commission on Law Enforcement and Administration of Justice: Task Force on Narcotics and Drug Abuse, supra (off. ed.), p. 222.

¹⁰²"Uniform Parole Reports", supra, Table VII.

¹⁰³See this brief, supra, pp. 62-67.

Concerning recidivism involving violent crime, it is unfair to lump heroin addict statistics with those of certain other dangerous drugs. First, most of the violent crime in New York is not committed by addicts.¹⁰⁴ Secondly, heroin addicts are significantly less likely to commit homicide, rape, and assault than are users of alcohol, amphetamines, and barbiturates.¹⁰⁵ A Bureau of Narcotics study of 6 cities, including Brooklyn, showed that most non-drug felony arrests were of barbiturate users, and that barbiturate users were 4 times more likely (and amphetamine users 2 times more likely) than heroin users to be arrested for aggravated assault.¹⁰⁶

This all results in a tiny percentage of the new crimes committed by narcotic, and especially heroin felons, being for crimes of violence. As noted by the 4th Circuit,¹⁰⁷ in striking down a recidivist statute which mandated life for

¹⁰⁴ N.Y. Temporary State Commission to Evaluate the Drug Laws report: "Employing the Rehabilitated Addict" (N.Y. State Legislative Doc. No. 10, 1973), p. 9.

¹⁰⁵ National Comm. on Marihuana and Drug Abuse, 2d Report, supra, pp.162-63. See also, Licit and Illicit Drugs, supra, pp. 286-88.

¹⁰⁶ N.Y. Temp. State Comm. to Evaluate the Drug Laws rpt.: "How People Overseas Deal with Drugs" (N.Y. State Legislative Doc. No. 11, 1973) p. 49.

¹⁰⁷ Hart v Coiner, 483 F2d 136 (CA4, 1973), cert. den., 415 US 938, 39 LEd2d 495, 94 SCt 1454 (1974), reh. den., 416 US 916, 40 LEd2d 118, 94 SCt 1624 (1974).

certain offenders:

"Life imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others. It is not a practical solution to petty crime in America."

Although not all drug crimes are "petty", neither are they heinous, and, as amicus below had pointed out, the New York Drug law not only fails to make, but prohibits relevant distinctions from being made by the courts among different offenders and offenses.

The recidivism statistics must also be viewed from a different perspective when considering that ALL narcotic felons must be given life terms without any possibility of release from parole, although all other offenders may be released from parole (even if serving a life sentence) after 5 years:

(1) The obverse of Oswald's erroneous statistics that 60% to 65% of narcotic felons commit new crimes after release, is that 35% to 40% NEVER commit another crime. The more accurate Uniform Parole Reports indicate that more than 75% of narcotics felons NEVER commit another crime.¹⁰⁸

(2) New York parole statistics show that about 93% of all parole violations occur within the first two years after release on parole and that less than 1% occur after 5 years.¹⁰⁹

¹⁰⁸"Uniform Parole Reports", supra, Table I.

¹⁰⁹These figures are based on violations for any reason (new crimes, technical violations, and absconding from parole) by parolees released from 1968 through 1973. N.Y. Dept. of Correctional Services, Annual Statistical Report; Inmate and Parole Populations; 1973 Data (Dept. Corr. Serv., Albany, 1974), p. 68 (Table D-2), p. 97 (Table DR-4a).

The New York Court of Appeals and Appellate Division in this case nevertheless relied chiefly on Oswald's off-hand recidivism statistics in upholding the mandatory drug law sentences.¹¹⁰

The anomaly is that the addict or pusher must be given a life sentence because of the crimes it is feared he might commit. However, the persistent felony offender,--one who actually commits several of those feared crimes, and commits them intentionally, ruthlessly, for anger or profit, but without any pharmacological duress caused by addiction and without committing a narcotics offense-- may not be given a life sentence (or even a minimum term) unless it is shown on the record to be necessary because of specific facts surrounding that particular criminal and his particular crimes.¹¹¹

The U.S. Supreme Court has since established that an excessive punishment for an offense may not constitutionally be justified by the possibility of associative collateral crimes.¹¹²

¹¹⁰ See supra, fn. 95, at beginning of this subsection.

¹¹¹ P.L. §70.10(2).

¹¹² Coker v Georgia, supra, ___ US ___, 53 LEd2d at 993-94.

See, applying this rule to the 1973 N.Y. drug laws, United States ex rel. Carmona v Ward, ___ F Supp ___, 21 CrL 2475 (S.D.N.Y., 1977), app. pending (CA2, Docket No. 77-2110).

5. SUMMARY

The opiates, unlike alcohol and tobacco, cause no physical or mental deterioration, and only extremely minor, temporary side effects during the short period of the drug's effect. The major problem with opiates is that they may produce a life-long dependency. This dependency, coupled with the criminalization of the opiates and the consequent necessity of obtaining the drug through the black market is what causes the crime and deterioration of health and social productivity. Many sellers of narcotics are themselves addicts who are forced to sell to pay for their own drugs. Most addicts in this country and elsewhere who have been able to procure a legal, inexpensive supply of opiates lead relatively normal, healthy, socially productive, law-abiding lives.

The crime which does result from opiate addiction under prohibition is mostly non-violent property crime, as distinguished from the violent crime with which alcohol abuse is strongly associated. Moreover, any aggressive or violent tendencies are calmed by the tranquilizing opiates, thereby reducing the probabilities of violent crime below that which could be expected if the person refrained from using the drug.

Considering the minimal medical, social and criminogenic effects on the user and society of opiate addiction per se, the sale of opiates ought to invoke lesser penalties than those for the illegal sale of alcohol and tobacco.

Considering even the serious effects of opiate addiction on the user and society resulting from prohibition, there can be no justification for New York's penalizing the sale and possession of opiates more severely than any other crime on its books, including murder, riot, rape, kidnapping, and arson, and more severely than persistent felony offenders.

2. NATURE OF CIRCUMSTANCES SURROUNDING CRIMINAL CONDUCT.

a. LEGAL PRINCIPLES.

The presence of mitigating or non-aggravating circumstances surrounding the acts by which the crime was committed must be considered in determining whether a given punishment is cruel and unusual.¹¹³ This need for individualized sentences was re-emphasized by the U.S. Supreme Court in its recent series of capital punishment cases, which required detailed consideration of such circumstances as a sine qua non for imposition of the death penalty.^{113a} Although the court left open the question whether these considerations would be required in non-capital cases, it left no doubt that failure to permit their consideration would remain a factor in 8th Amendment claims, saying that "justice generally requires" it.^{113b}

A lengthy, mandatory sentence, which precludes the offender from the benefit of any special equity or mitigating circumstances, is itself a sign of unusual severity.¹¹⁴ This is particularly true of the penultimate sentence of life imprisonment. Thus, a 30-year sentence

¹¹³ Weems v United States, supra, 217 US at 363, 365, 381, 54 LED at 797, 804; In re Lynch, supra, 503 P2d at 930-31, 939-40; In re Foss, supra, 112 Cal Rptr at 654-57.

^{113a} Gregg v Georgia, 428 US 153, 49 LED2d 859, 96 SCT 2809 (1976), reh. den., 429 US 875, 50 LED2d 158, 97 SCT 197, 198; Jurek v Texas, 428 US 262, 49 LED2d 929, 96 SCT 2950 (1976), reh. den., 429 US 875, 50 LED2d 158, 97 SCT 197, 198; Proffitt v Florida, 428 US 242, 49 LED 2d 913, 96 SCT 2960 (1976), reh. den., 429 US 875, 50 LED2d 158, 97 SCT 197, 198; Roberts (Harry) v Louisiana, ___ US ___, 52 LED2d 637, 97 SCT ___ (1977); Roberts (Stanislaus) v Louisiana, 428 US ___, 49 LED2d ___, 96 SCT ___ (1976), reh. den., 429 US 980, 50 LED2d 173, 97 SCT 248; Woodson v North Carolina, 428 US 280, 49 LED2d 944, 96 SCT 2978 (1976).

^{113b} Woodson v North Carolina, supra, 428 US at 304, 49 LED2d at 961; Gregg v Georgia, supra, 428 US at 189, 49 LED2d at 883: both citing with approval, Williams v New York 337 US 241, 247, 93 LED 1337, 1342, 69 SCT 1079 (1949); Williams v Oklahoma, 358 US 576, 585, 3 LED2d 516, 522, 79 SCT 421 (1959); Pennsylvania ex rel. Sullivan v Ashe, 302 US 51, 55, 82 LED 43, 46, 58 SCT 154 (1937).

¹¹⁴ People v Bruinsma, 34 Mich App 167, 191 NW2d 108, 117 (Mich.Ct App., 1971); see also dictum, in Jurek v Texas, supra, 428 US at 271, 49 LED2d at 938.

for burglary, extending beyond the defendant's life expectancy, was found to be cruel and unusual as applied to an unaggravated first offense.¹¹⁵

In Woodson and Roberts (S.), the Supreme Court noted that a mandatory sentencing scheme "may well exacerbate" the standardless sentencing power condemned in Furman by inviting jurors to disregard their oaths and refuse to convict whenever they capriciously (without standards, background, or judicial review) feel that the death penalty is inappropriate.¹¹⁶ In this connection, the Joint Committee of the N.Y.C. Bar Assn. and the Drug Abuse Council found that by 1975, the total number of felony drug convictions had fallen to almost half the 1972 level,^{116a} and that there had been a steady decline in the proportion of drug arrests resulting in indictments^{116b} and of indictments resulting in convictions.^{116c}

Where rational gradations of culpability within a crime can be made on the basis of injury to the victim, that circumstance should also be considered.¹¹⁷

¹¹⁵ State v Kimbrough, 212 SC 348, 46 SE2d 273, 277 (1948).

¹¹⁶ Woodson v North Carolina, supra, 428 US at 303, 49 LEd2d at 960; Roberts (Stanislaus) v Louisiana, supra, 428 US at 335 & n.11, 49 LEd2d at 982 & n.11.

^{116a} Assn. of the Bar of the City of New York/Drug Abuse Council, Inc., The Nation's Toughest Drug Law: Evaluating the New York Experience (Final Report of the Joint Committee on New York Drug Law Evaluation) (1977), p. 95.

^{116b} Id., p. 87.

^{116c} Id., p. 93.

¹¹⁷ In re Lynch, supra, 503 P2d at 931; In re Foss, supra, 112 Cal Rptr at 654; Ralph v Warden, Maryland Penitentiary, 438 F2d 786, 793 (CA4, 1970). Using this factor, the death penalty for rape was voided where the victim's life was neither taken nor endangered, even though the act was forcible. Ralph v Warden, Maryland Penitentiary, supra, 438 F2d at 792-93; Coker v Georgia, ___ US ___, 53 LEd2d 982, 97 Sct 2861 (1977). Mandatory life sentences for second convictions of lewd conduct involving indecent exposure without any force have been voided on the same ground. In re Lynch, supra, 503 P2d at 930-31; State v Evans, 73 Idaho 50, 245 P2d 788, 792 (1952).

In the case of heroin and marijuana sales, the courts have held lengthy mandatory minimum sentences to be cruel and unusual where the statute failed to permit the court to distinguish the particular circumstances of the offense, such as the quantity involved, whether the transaction was that of an addict to support his habit or a large-scale pusher to obtain a profit, or whether the transaction was a sale or gift, involved a friend or stranger, or involved an emergency situation or a person suffering from withdrawal pains.¹¹⁸

Concerning the situation of an addict selling heroin to support his habit, the California Supreme Court, in In re Foss,¹¹⁹ relied on what has been termed by another court, the "doctrine of pharmacological duress",¹²⁰ not as a defense, but as a factor that must be considered for sentencing.

The U.S. Supreme Court has held that opiate addiction is a disease properly subject to medical treatment,¹²¹ and that punishment (90 days in jail) for the status of being a narcotic addict is, in light of contemporary human knowledge, cruel and unusual,¹²² although

¹¹⁸ In re Foss, supra, 112 Cal Rptr at 655-57 (voiding 20-year minimum without possibility of parole for second sale of heroin); People v Bruinsma, supra, 191 NW2d at 117 (voiding mandatory 20-year minimum for sale of marijuana); People v Lorentzen, 387 Mich 167, 194 NW2d 827, 831 (1972) (voiding mandatory 20-year minimum for sale of marijuana). --See added citation below--

¹¹⁹ In re Foss, supra, 112 Cal Rptr at 655-57.

¹²⁰ See Watson v United States, 439 F2 442, 451, n.8 (CA DC, 1970) (en banc); See also, Comment: "Emerging Recognition of Pharmacological Duress as a Defense to Possession of Narcotics: Watson v United States", 59 Geo L J 761 (1971).

¹²¹ Linder v United States, 268 US 5, 18, 69 LEd 819, 823, 45 Sct 446 (1925).

¹²² Robinson v California, 370 US 660, 666, 8 LEd2d 758, 82 Sct 1417 (1962).

¹¹⁸, cont. See also, Weems v United States, supra, 217 US at 363, 365, 54 LEd at 797, where the mandatory sentence was condemned partly because it was imposed regardless whether the offender "does or intends to injure or defraud" or "obtained nor attempted to obtain a personal benefit".

punishment is permitted for overt acts (disorderly public conduct while under the influence of alcohol) resulting from addiction.¹²³

In the latter holding, however, the court noted that the nature of the conduct made criminal is relevant to the fitness of the punishment imposed.¹²⁴

The California Supreme Court ruled that the rationale of Robinson (holding it cruel to punish the status of addiction) adds a compelling consideration to the determination whether a mandatory 10-year minimum sentence without parole for the sale of heroin is cruel and unusual or fit punishment as applied to an addict who sells solely to support his habit.¹²⁵ Measured from the evolving standards of decency, the court held that the statute was cruel in its failure to consider the extent to which the addict's sale of heroin is attributable to a psychological or physiological compulsion arising from his addiction.¹²⁶

¹²³ Powell v Texas, 392 US 514, 532-33, 20 LEd2d 1254, 1267-68, 88 Sct 2145 (1968). However, the court carefully pointed out that the state had not attempted to reach intoxicating behavior in the privacy of his own home. Id., 392 US at 532, 20 LEd2d at 1267, and that there was no medical consensus that chronic alcoholics suffer from such an irresistible compulsion to drink and get drunk in public that they are utterly unable to control these acts and thus cannot be deterred at all from public intoxication. Id., 392 US at 535, 20 LEd2d at 1269.

¹²⁴ Id., 392 US at 532, 20 LEd2d at 1267.

¹²⁵ In re Foss, supra, 112 Cal Rptr at 656.

¹²⁶ Id., at 656-57.

b. APPLICATION.

Every person convicted in New York of selling narcotics must be given a sentence of life imprisonment with a mandatory minimum prison term. Probation is not permitted. The following factors are irrelevant except for determining the time the offender will become eligible for release on lifetime parole:

1. The quantity of narcotics sold, whether a single fix, a thousand bags, or a million dollar shipment. Life imprisonment.
2. The nature of the transaction, whether a sale for money, an exchange, a gift, or an unaccepted offer.¹²⁷ Life imprisonment.
3. The relationship of the parties, whether spouse, friend, or stranger. Life imprisonment.
4. The motivation, whether for profit, solely for money needed to support the seller's own addiction, or for humanitarian reasons to help a desperately sick friend begging for heroin to stop withdrawal pains (even if the giver is a physician). Life imprisonment.
5. The seller's status in the narcotics distribution system, whether he is an importer, kilo connection, an ounce man, a street pusher, or a non-seller who simply passes the needle to a friend. Life imprisonment.
6. Most importantly, the status of the buyer, whether known by the seller to be an addict or a non-addict. Life imprisonment.

In England, the only major concern of law enforcement officials is the legitimate one of keeping narcotics out of the hands of non-addicts.¹²⁸

¹²⁷ "Sell" is defined by P.L. §220.00(1) as meaning "to sell, exchange, give or dispose of to another, or to offer to or agree to do the same."

¹²⁸ Licit and Illicit Drugs, supra, pp. 122, 128.

The mandatory minimum sentence is determined by the aggregate weight of the narcotic mixture involved.

The sale of any amount is a class A-III felony, carrying a mandatory minimum term of one year. Sale of only 1/8th of an ounce is an A-II, carrying a mandatory minimum of 6 to 8 1/3 years. Sale of an ounce is an A-I, carrying a mandatory minimum of 15 to 25 years.

The possession offenses are similarly classified by small differences in weight, with one ounce being an A-II felony and two ounces being an A-I felony.

However, the aggregate weight standard has little bearing on relative seriousness of the three grades of the offense, particularly where the distinctions involve fractions of an ounce.

The National Commission on Marihuana and Drug Abuse reports that:

"Morphine is isolated from the opium and then chemically acetylated to 100% pure diacetylmorphine (heroin). In the United States, the heroin is progressively diluted 20-100 fold by mixing with quinine, lactose, mannitol, baking soda, etc., as it passes down the distribution channels. The street level vendor or pusher generally sells 1-5% heroin and 95-99% adulterants." 129

Thus possession or sale of less than 1/8th of an ounce of the relatively pure heroin by a person near the top of the drug distribution hierarchy is guilty of no more than an A-III felony, even though he supplies 9 pushers in that transaction with enough heroin to make each of them, under the aggregate weight standard, guilty of A-I felonies.

The Second Circuit, in rejecting a due process challenge to the aggregate weight standard under the old law, when 8 ounces marked the difference between a class C and class B felony, nevertheless recognized the possibility of "remarkably unjust results" from that standard under the new law. 129a

129 Jack D. Blaine, Louis P. Bozzetti, & Kjell E. Ohlson, "The Narcotic Analgesics: The Opiates", in Appendix, vol. I, p. 60 at p. 76 of The Technical Papers of the Second Report of the Nat'l Commission on Marihuana and Drug Abuse (GPO, Washington, 1973).
501 F.2d 1180, 1185 (CA2, 1974).

The U.S. District Court for the Southern District of New York, in the Carmona case,^{129b} declaring the 1973 N.Y. drug laws unconstitutionally excessive, pointed to the 8th Amendment requirement that a legislature make "some rational gradations of culpability" in determining mandated punishments. The punishments provided by New York for class A drug felonies, it found,

"are quite extraordinary in their failure to differentiate between minor offenders and major drug dealers."

The court further noted that:

"whatever rationality is imparted to the A felony drug punishment scheme by the differentiation based upon the amount of narcotic-containing substance involved has been substantially vitiated by the operation of the law in practice."

^{129b} United States ex rel. Carmona v Ward, ___ F Supp ___, 21 CrL 2475 (S.D.N.Y., 1977), app. pending (CA2, Docket No. 77-2110).

3. NATURE OF THE CRIMINAL.

a. LEGAL PRINCIPLES.

It has long been considered fundamental that the punishment should fit the criminal as well as the crime.¹³⁰ - The Supreme Court. requires consideration of the character and record of the individual offender before the death penalty may be invoked.^{130a} Although the court left open the question whether these considerations would be required in non-capital cases, it left no doubt that their absence would remain a factor in 8th Amendment claims, saying that "justice generally requires" consideration of the character and propensities of the offender,^{130b} and noting "our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender'".^{130c} The New York Court of Appeals recognized the applicability of this doctrine to the 8th Amendment question about the 1973 drug laws.^{130d}

It has, for instance, been held to be cruel and unusual to impose a 30-year sentence for burglary on a first offender,¹³¹ to impose life imprisonment for indecent exposure on a man of superior intellect,

¹³⁰ The character and propensities of the offender should be taken into account in determining a proper sentence. Williams v New York, 337 US 241, 247, 93 LEd 1337, 1342, 69 Sct 1079 (1949); Pennsylvania ex rel. Sullivan v Ashe, 302 US 51, 55, 82 LEd 43, 46, 58 Sct 154 (1937).

^{130a} Eg., Woodson v North Carolina, supra, 428 US at 303, 49 LEd2d at 960-61.

^{130b} Id. 428 US at 304, 49 LEd2d at 961; Gregg v Georgia, supra, 428 US at 189, 49 LEd2d at 883.

^{130c} Roberts (Stanislaus) v Louisiana, supra, 428 US at 333.

^{130d} People v Broadie, 37 NY2d 100, 113, 371 NYS2d 471, 477 (1975).

¹³¹ State v Kimbrough, 212 SC 348, 46 SE2d 273, 277 (1948).

great potential, and pleasant personality,¹³² and to impose life imprisonment for rape on a juvenile, because of the impossibility of determining that a youth will remain incorrigible for the rest of his life.¹³³

What has been found to be particularly loathsome to the courts is a legislatively mandated lengthy sentence, either minimum or maximum, which precludes the sentencing judge from effective consideration of the defendant's characteristics and criminal propensities.¹³⁴

It has also been said that if the offense is not a serious danger to society, the penalty may be disproportionate even though the defendant be neither young nor a first offender.¹³⁵

¹³² In re Lynch, supra, 503 P2d at 939.

¹³³ Workman v Comm., 429 SE2d 374, 377-78 (Ky.Ct.App., 1968).

¹³⁴ Mandatory life terms were held cruel and unusual partly because of this factor, in In re Lynch, supra, 503 P2d at 930-31, 939-40 (second offense of lewd conduct); State v Evans, 73 Idah 50, 245 P2d 788 (1952)(lewd conduct with minor); Workman v Comm., supra, n.4 (rape, as applied to juvenile).

Mandatory minimum terms without possibility of parole during the minimum were held cruel and unusual partly because of this factor, in In re Foss, supra, 112 Cal Rptr at 654-57 (10 years for second offense of sale of narcotics); People v Bruinsma, 34 Mich App 167, 191 NW2d 108, 117 (Mich.Ct.App., 1971)(20 years for sale of marijuana); People v Lorentzen, 387 Mich 167, 194 NW2d 827, 834 (Mich.Sup.Ct., 1972)(20 years for sale of marijuana).

¹³⁵ In re Lynch, supra, 503 P2d at 931.

b. APPLICATION

In New York a person who sells or gives away narcotics must be given a life sentence with a mandatory minimum term and may not be given probation, regardless of his or her age, character, attitudes, stability, responsibility, family responsibilities, criminal record or rehabilitation potential.

The argument that lifetime probation is available to informers if the prosecutor consents,¹³⁶ overlooks the point that the very people for whom leniency is most warranted--defendants who are not regular pushers, but who were caught in an isolated transaction or a gift of narcotics to a friend--will have no information sufficient to qualify for probation. Indeed, N.Y.C. special prosecutor Frank Rogers talked of having given probation only to 7 major multi-kilo dealers in exchange for information.¹³⁷

The New York Court of Appeals noted that neither of the present petitioners was an "accidental" offender, noting that one had sold drugs in the street and that the other possessed a large amount of drugs, even though neither was a hardened criminal either, and thereby concluded that the sentencing court's statutory inability to consider the character of the offender in setting the minimum did not render the sentencing structure infirm.¹³⁸

Although the present defendants and their conduct might not be the exceptional case warranting probation, neither are they the exceptional case warranting the most severe sanction available. As the Court of Appeals acknowledged, neither of them is a hardened criminal.

¹³⁶P.L. Section 65.00(1)(b), (3)(a)(ii) .

¹³⁷"200 Convicted Under Strict Drug Law", N.Y.T., Nov.10, 1974, p.1, c.5, at p. 72, c. 5.

¹³⁸People v Broadie, 37 NY2d 100, 113, 371 NYS2d 471, 477-78 (1975).

4. NATURE OF PENOLOGICAL PURPOSES OF PUNISHMENT; REHABILITATION.

a. CRUEL AND UNUSUAL PUNISHMENT.

Rehabilitation, along with punishment, isolation to temporarily protect society, and deterrence,¹³⁹ is recognized as a major consideration in criminal punishment, but, as noted by the N.Y. Court of Appeals, "There is no place in the scheme of punishment for its own sake, the product simply of vengeance or retribution."¹⁴⁰

Lengthy mandatory minimum terms for the sale of heroin and marijuana have been declared cruel and unusual partly because they are totally inconsistent with the recognized penological goal of rehabilitation.¹⁴¹ They preclude parole consideration even after the prisoner has been able to overcome his addiction or show real promise of rehabilitation, and therefore removes any impetus toward self-improvement.¹⁴² Such prolonged sentences cause irreparable

¹³⁹ Williams v New York, 337 US 241, 248, n. 13, 93 LEd 1337, 1343, n. 13, 69 Sct 1079 (1949); People v Oliver, 1 NY2d 152, 160 (1956); Weems v United States, supra, ¹⁴⁰ 271 US at 581, 54 LEd at 804.
¹⁴⁰ People v Oliver, 1 NY2d 152, 160 (1956).

¹⁴¹ People v Bruinsma, supra, 191 NW2d at 117.

¹⁴² In re Foss, supra, 112 Cal Rptr at 657. See also, testimony of Myrl E. Alexander, Director, Bureau of Prisons, Department of Justice, who complained that the lack of flexibility in the statutes resulted in personal achievement and rehabilitation of addict offenders being stymied because of lack of positive motivations, and that timing and conditions of release have no relationship to individual progress. "Civil Commitment and Treatment of Narcotic Addicts", Hearings before Subcomm. No. 2 of the Committee of the Judiciary, House of Rep., 89th Congress, 1st and 2d Sess. (1965-66), p. 369, at p. 370.

harm,¹⁴³ and are inconsistent with the widespread view among experts on penology and criminal corrections that, except for extremely serious crimes or unusually disturbed persons, the goal of rehabilitating offenders with maximum effectiveness can best be reached by short sentences of less than 5 years' imprisonment.¹⁴⁴

The New York Court of Appeals, in the present case, said that rehabilitation is only one of the purposes of penal sanctions and that the legislature could reasonable shift emphasis to the other legitimate purposes of isolation and deterrence because of the high recidivism rate in drug-related crime and the failure of rehabilitation programs and less severe punishments to stem the drug epidemic.¹⁴⁵ However, as noted elsewhere in this brief, the new drug law has failed to make any measurable contribution to either of these goals.^{145a}

¹⁴³People v Bruinsma, supra,. See also, testimony of Dr. Stanley Yolles, then Director of the National Institute of Mental Health, before the House Select Committee on Crime in 1967, saying that mandatory minimum sentences for narcotics offenders destroy the hope for starting a fresh life, are contradictory to the whole concept of medicine, are psychologically shattering, and destroy the prospects of rehabilitation. Quoted in Licit and Illicit Drugs, supra, p. 57.

¹⁴⁴People v Lorentzen, supra, 194 NW2d at 833; In re Foss, supra, 112 Cal Rptr at 657.

¹⁴⁵People v Broadie, 37 NY2d 100, 114-15, 371 NYS2d 471, 478-79 (1975).

^{145a} See infra, Point II, §(B)(3).

The New York law does not simply "shift emphasis" away from the purpose of rehabilitation to other purposes. The complete deprivation of hope caused by mandatory life imprisonment and lifetime parole ~~with permanent ineligibility for discharge from parole~~ is the very antithesis of rehabilitation, and creates an irrebutable presumption that narcotics offenders can never be rehabilitated. This presumption and the reasons ascribed to it by the Court of Appeals are discussed more fully in the following section.

In the Foss case, the court, although it also recognized that rehabilitation was not the only purpose of imprisonment, did not think that the goals of either isolating the offender from society or of deterring others were sufficient to justify the severity of a mandatory minimum sentence. If the offender continued to be dangerous, the parole authorities could simply refuse to grant parole. The minimum term affords no extra protection, but only hinders the parole authority's ability to release a prisoner earlier if warranted, and increases the cost to society, both in actual expenditures for imprisonment and in the ill effects suffered by the offender and his family from unduly long periods of incarceration. The court also failed to perceive how such sentences act as a deterrent to the addict who is driven to commit offenses by the psychological and physiological compulsions attendant to his addiction.¹⁴⁶

¹⁴⁶In re Foss, supra, 112 Cal Rptr at 658.

C. PENALTIES IN NEW YORK FOR MORE SERIOUS CRIMES.

1. LEGAL PRINCIPLES.

a. CRUEL AND UNUSUAL PUNISHMENT.

A widely used technique for determining whether a punishment is cruel and unusual is to compare it with the punishments prescribed in the same jurisdiction for other offenses which are considered to be more serious.¹ As stated in the Lynch case: "The underlying but unstated assumption appears to be that although isolated excessive penalties may occasionally be enacted, eg.,

1 Punishments were found to be cruel and unusual partly because they were more severe than those authorized for more serious crimes in the same jurisdiction in the following cases:

Weems v United States, supra, 217 US at 380, 54 LEd at 803-04, where penalty for false entries in government records was more severe than degrees of homicide, inciting rebellion, robbery, larceny, etc.

In re Lynch, supra, 503 P2d at 935, 937, where penalty for lewd conduct was more severe than that for manslaughter, kidnapping, assault with intent to injure or disfigure, other sexual conduct crimes, crimes against children, and recidivism statutes.

In re Foss, supra, 112 Cal Rptr at 658-60, where penalty for second offense of sale of heroin was more severe than that for 3rd felony offenders and for murder, robbery, rape, etc.

People v. Lorentzen, supra, 194 NW2d at 831-32, where penalty for sale of marijuana was more severe than that for crimes involving the sale of other harmful substances, including adulterating food, placing razor blades in food, and selling explosives and machine guns, and for many crimes involving harm to people, including manslaughter, aggravated assault, 2nd degree murder, kidnapping and rape.

People v. Bruinsma, supra, 191 NW2d at 116, where penalty for sale of marijuana was more severe than that for 2nd degree murder, armed robbery, rape, and kidnapping.

State v. Evans, supra, 245 P2d at 793, where penalty for lewd conduct with a minor was more severe than that for rape.

Dembrowski v State, 251 Ind 250, 240 NE2d 815 (1968), where penalty for simple robbery was more severe than that for armed robbery.

Applic. of Cannon v. Gladden, 203 Ore 629, 281 P2d 233, 235 (1955) (in bank), where penalty for assault with intent to commit rape was more severe than that for rape.

rape was more severe than that for rape.
42 U.S.C. § 1993a, supra, 53 LE2d at 993-94 (where rape was punished as heavily or more heavily than murder).

through 'honest zeal' (Weems v United States...) ² generated in response to transitory public emotion, the Legislature may be depended upon to act with due and deliberate regard for constitutional restraints in prescribing the vast majority of punishments set forth in our statutes. The latter may therefore be deemed illustrative of constitutionally permissible degrees of severity; and if among them are found more serious crimes punished less severely than the offense in question, the challenged penalty is to that extent suspect." ³

The only exception to this comparative procedure has been with severe penalties enacted for other offenses as part of the same legislation containing the challenged penalty. As is stated in the Foss opinion: "Similar penalties for related offenses enacted by the same legislation are subject to the same 'zeal' as the punishment in question. Such penalties cannot, therefore, be taken as illustrative of the permissible degrees of severity....(under the cruel and unusual punishment prohibition)."

² Citing Weems v United States, supra, 217 US at 373, 54 LEd at 801, in which it was said that, "Cruelty might become an instrument. ...of zeal for a purpose, either honest or sinister."

³ In re Lynch, supra, 503 P2d at 931-32.

⁴ In re Foss, supra, 112 Cal Rptr at 660.

b. EQUAL PROTECTION.

In addition to being a factor in determining whether a given penalty is cruel and unusual, a significant disparity between the challenged penalty and that for similar or more serious crimes wit' in the same jurisdiction furnishes an independent basis under the equal protection clause for invalidating the penalty.

In striking down under the equal protection clause, a mandatory sterilization statute for third felony offenders which applied to larceny, but exempted embezzlement, the United States Supreme Court said that: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a distrimination as if it had selected a particular race or nationality for oppressive treatment."¹

The New Jersey legislature's "Drug Study Commission" report of October 1974 noted the "jarring inequities" of the Rockefeller drug law and, pointing out that the violent robber is clearly more dangerous to society than the drug pusher or user, yet faces a significantly lighter sanction, concludes that the law "seems to be a denial² of equal protection", as well as a violation of the 8th Amendment.

¹ Skinner v Oklahoma ex rel. Williamson, 316 US 535, 541, 86 LEd 1655, 1660, 62 SCT 1110 (1942).

² N.J. "Drug Study Commission", First Report to the Legislature (Oct. 1974), supra, pp 188-89.

2. APPLICATION.

As noted by the New York Court of Appeals, the sale of narcotics is punished more severely and more inflexibly than any other offense in the State of New York.⁵

Aside from drug offenses, the only other class A offenses carrying mandatory life terms are arson 1st (causing explosion in occupied bldg.),⁶ kidnapping 1st,⁷ murder,⁸ and attempted murder of a police officer.⁹

At the time of the appellants' convictions, narcotics possession and sale offenses were the only class A felonies which were prohibited from being reduced by plea bargaining below the A-III level,¹⁰ which still carried a mandatory life maximum.

Not even a persistent (third) felony offender is subject to a mandatory life sentence. Such a sentence may be imposed only if the court decides that it is necessary for the public interest because of the history and character of the defendant and the nature and circumstances of his criminal conduct; and the court must state in the record its reasons for these conclusions.¹¹

⁵ People v Broadie, 37 NY2d 100, 116, 371 NYS2d 471, 480 (1975).

⁶ P.L. §150.20.

⁷ P.L. §135.25.

⁸ P.L. §125.25.

⁹ P.L. §110.05(1).

¹⁰ CPL §220.10(6)(a) & §220.30(3)(b)(i). A 1976 amendment prospectively permitted a person indicted for an A-III drug felony to plead down to a class C felony, but those indicted for A-II and A-I drug felonies are still limited to an A-III plea.

¹¹ P.L. §70.10(2). For second felony offenders, there is no increase in the authorized maximum, but there is a mandatory minimum maximum (eg., at least 9 years and not more than 25 years for a class B felony) and a mandatory minimum term of one-half the maximum. See P.L. §70.06.

Not only are the drug offenses the only non-violent class A felonies in New York, but most serious violent crimes, including 1st degree rape, are class B felonies, which carry neither a possible life maximum nor any mandatory minimum.

In Coker, voiding the death penalty for rape, the U.S. Supreme Court stressed that:

"Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." ^{11a}

If rape cannot be punished as severely as murder with aggravating circumstances, neither can the non-violent crime of drug possession or sale.

The next lower felony classification (class B), which carries a discretionary maximum of 25 years and no mandatory minimum, ¹² embraces attempted murder (other than of a police officer) and attempt to commit any other class A felony except a drug felony, ^{12a} arson 2d (causing fire in occupied bldg.), ¹³ bribery 1st, ¹⁴ bribe receiving 1st, ¹⁵ burglary 1st, ¹⁶

^{11a} Coker v Georgia, supra, 53 LEd2d at 993.

¹² P.L. §70.00. A minimum term of not more than 1/3 of the maximum may be imposed only if the court decides that it is necessary for the ends of justice and best interests of the public because of the nature and circumstances of the crime and of the history and character of the defendant; and the court must state in the record its reasons for these conclusions. P.L. §70.00(3)(b).

^{12a} P.L. §110.05(1-4). An attempt to commit a class A drug felony remains a class A felony of the same degree. P.L. §110.05(1-3).

¹³ P.L. §150.15.

¹⁴ P.L. §200.04.

¹⁵ P.L. §200.12.

¹⁶ P.L. §140.30.

conspiracy 1st,¹⁷ criminal mischief 1st,¹⁸ kidnapping 2nd,¹⁹
manslaughter 1st,²⁰ rape 1st,²¹ robbery 1st,²² sodomy 1st,²³ and
possession of explosives with intent to use unlawfully against the
person or property of another.²⁴

Indeed, a person can commit any number of class B felonies
(or non-drug class A felonies to which class B felony pleas are
accepted), and yet be sentenced to a maximum of only 30 years
imprisonment if the series of crimes was committed prior to the
time the person was imprisoned under any of the sentences arising
out of those crimes.²⁵

¹⁷ P.L. Sec. 105.15.

¹⁸ P.L. Sec. 145.12.

¹⁹ P.L. Sec. 135.20.

²⁰ P.L. Sec. 125.20.

²¹ P.L. Sec. 130.35.

²² P.L. Sec. 160.15.

²³ P.L. Sec. 130.50.

²⁴ P.L. Sec. 265.05 (7).

²⁵ P.L. Sec. 70.30 (1) (c), providing that: "The aggregate maximum term of consecutive sentences imposed for two or more crimes committed prior to the time the person was imprisoned under any of such sentences shall, if it exceeds twenty years, be deemed to be twenty years, unless one of the sentences was imposed for a class B felony, in which case the aggregate maximum term shall, if it exceeds thirty years, be deemed to be thirty years."

Thus, a person who attempts to murder, who kills with intent to cause serious physical injury, who causes serious physical injury in the course of a robbery, who rapes, who blows up an occupied building, faces a maximum term of 25 years, or a maximum of 30 years for a series of such acts before being imprisoned on any one of them. Although imprisonment is mandatory, no minimum term may be imposed (and life imprisonment may not be imposed even for a third felony offender) unless the court gives reasons for concluding that the best interest of the public requires it because of the nature and circumstances of the crime and of the history and character of the defendant. Such a person will not remain on parole for the rest of his life, nor will he be denied the opportunity to engage in plea bargaining--the traditional means by which the courts mitigate the punishment required by the legislature for a crime when the circumstances of the particular case and the interest of justice require it.

Not so for the narcotics "seller". Whether he sells a bag of heroin for profit or to support his own addiction, or whether he gives away a "fix" to a desperately sick friend suffering from withdrawal pains (where the consequences to the "victim" and to society are minimal, by any scale of values), the mandatory maximum penalty of life remains the same. He must be punished much more severely than the armed robber who shoots his victim or than the multiple rapist. He must be punished as severely as the most heinous murderers, kidnappers, and arsonists, and more severely than many of them. He is even denied the privileges accorded to all other

criminal defendants, including multiple and persistent felony offenders, of plea bargaining and of judicial discretion is setting a maximum term in accordance with the nature and circumstances of the particular criminal conduct involved and with the history and character of the defendant.

No view of the dangerousness of narcotics to individuals or to society as a whole can justify such disparate punishment.

--ASSOCIATIVE COLLATERAL CRIMES.

The New York Court of Appeals, in Broadie, reluctantly found enough justification to prevent this disparity from being unconstitutional in the possibility that the legislature could reasonably have found that drug trafficking is a generator of collateral crime, including some crimes of violence, and that narcotic felons have a higher recidivism rate than other felons.¹

However, the United States Supreme Court, in Coker, subsequently firmly established that an excessive punishment for an offense may not constitutionally be justified by the possibility of associative collateral crimes:

"Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not....the death penalty...is an excessive penalty for the rapist who, as such, does not take human life."^{1a}

Not even the actuality of collateral capital offenses not involving murder could justify the death penalty for rape, according

¹ People v Broadie, 37 NY2d 100, 112-13, 116, 371 NYS2d 471, 476-77, 480 (1975).

^{1a} Coker v Georgia, supra, 53 LEd2d at 993.

to Coker. In that case, the defendant's rape was committed during an armed robbery, which was also a capital offense for which Coker received a separate life sentence, and Coker had prior convictions for capital offenses. The court said that: "Neither of these circumstances, nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape."^{1b}

Even the surface plausibility of the N.Y. Court of Appeals' argument falls away under closer scrutiny.

The explicit legislative purpose of the crime classification scheme in New York's Penal Law is to differentiate on reasonable grounds between serious and minor penalties.²

Death and only two actions involving the grave risk of death (exploding an occupied building and lengthy abduction for prolonged sexual violation) are the distinguishing features of the class A felonies in New York, except for the drug offenses. Not even attempted murder or other actions involving the grave risk of death

^{1b} Id., continued from last page. 18422 at 993.

See also, United States ex rel. Carmona v Ward, ___ F Supp ___, 21 CrL 2475 (S.D.N.Y., 1977), app. pending (CA2, Docket No. 77-2110), holding that "it is necessary to judge the proportionality of a punishment with relation to the actual offense committed; a penalty cannot be justified solely by the potential for more serious conduct, even though it may be violent and dangerous.... Clearly there are constitutional limits to the extent to which the statistical, or assumed, connection between a particular offense and collateral crimes may be used to justify a particularly harsh penalty for commission of the acts in question." --said in declaring the 1973 N.Y. drug laws unconstitutional.

^{1b} Coker v Georgia, supra, 53 LEd2d at 993.

² P.L. §1.05(4).

are so branded. Yet, with few exceptions, such collateral crime as is fostered by black market heroin dealings does not involve death or even violence; instead, heroin tends to reduce aggressive impulses, and users have a lower rate of violent crimes than other criminals.³

Although the legislature has penalized certain precursor conduct where there is a sufficient nexus between it and the feared ultimate harm, such as attempts, conspiracy, possession of burglary tools, narcotics implements, and forgery devices, in no case-- except drug offenses-- is the punishment for the precursor conduct more severe than the conduct ultimately feared, had it materialized.

As shown elsewhere in this brief, the recidivism rate of narcotics felons is no higher than average. Furthermore, the mere statistical probability that an addict or seller might commit or cause others to commit criminal acts in the future is inadequate basis for conclusively presuming that he will do so. Even former Corrections Commissioner Oswald's inflated statistics show that 35% to 40% of narcotic felons do not recidivate,⁴ but the statutory scheme permits no reduction of the mandatory life imprisonment and parole, even if a defendant were found to be highly unlikely to commit any further crimes. Instead, there is an irrebutable presumption that anyone who sells or possesses narcotics for sale is

³ See Section of this brief on criminogenic effects, pp. 60-68.

⁴ See Section of this brief on recidivism, pp. 69-77.

responsible for causing so atrocious or large in number as to treat him as more dangerous than any other felon.

The fear of a large number of collateral crimes, as opposed to the nature of any particular crime, provides no greater justification for the classification. The anomaly remains that the addict or pusher must be given a life sentence because of crimes he might commit which is more severe (in that he may never be discharged from parole) than the sentence which may be imposed on a persistent felony offender who actually committed several of those feared crimes, and then only if supported by specific findings of necessity based on his peculiar circumstances.

Under Coker v Georgia, supra, this rationale fails the test of the 8th Amendment.

D. PENALTIES IN OTHER JURISDICTIONS FOR NARCOTIC OFFENSES.

1. LEGAL PRINCIPLES.

Yet another technique for determining whether a punishment is cruel and unusual is to compare it with the punishments prescribed for the same offense in other jurisdictions.¹

¹
Punishments were found to be cruel and unusual partly because they were more severe than those authorized for the same offense in most other jurisdictions in the following cases:
Weems v United States, supra, 217 US at 377, 380, 54 LEd at 802, 804, where the 12-year minimum term of imprisonment, followed by lifetime parole, for falsifying government records in the Philippines "has no fellow in American legislation", but contrasts greatly with a similar federal crime providing for a maximum of 2 years imprisonment.

Trop v. Dulles, 356 US 86, 102-03, 2 LEd2d 630, 643, 78 Sct 590 (1958), invalidating denationalization as a penalty for desertion where the civilized nations of the world--with the sole exceptions of the Philippines and Turkey--are in virtual unanimity that denationalization is not to be imposed as punishment for crime.

Ralph v Warden, Md. Pen., 438 F2d 786, 791-92 (CA4, 1970) where, in assessing a mandatory death penalty for rape, the court took note that there is a worldwide trend toward repealing the death penalty for rape, including two-thirds of the states of this country, and that in none of the remaining states is death mandatory, but is retained only as a sentencing alternate.

In re Lynch, supra, 503 P2d at 938-39, comparing a mandatory life sentence for a second offense of indecent exposure with the penalties authorized for multiple offenses of the same crime in other jurisdictions, none of which exceeds 3 years.

State v Evans, supra, 245 P2d at 792-93, comparing a mandatory life sentence for lewd acts committed on a minor with the sentence in other jurisdictions, none of which (except California) permitted a greater maximum than 25 years and none of which made the maximum penalty mandatory.

People v Lorentzen, supra, 194 NW2d at 832, comparing a mandatory 20-year minimum sentence for the sale of marijuana with the penalties authorized in other states, showing that 26 states have no minimum sentence; 3 provide a 2-year minimum; 9 have a 1-year minimum; 9 provide a 5-year minimum; and 1 provides a 10-year minimum; but only one state (Ohio), has as severe a minimum sentence for the sale of marijuana as Michigan.

In re Foss, supra, 112 Cal Rptr at 660, saying that a mandatory 10-year minimum sentence without possibility of parole for a second conviction for the sale of heroin is more severe than that imposed by the vast majority of states, with only 4 states (Alaska, Arizona, Georgia and Nebraska) imposing such a penalty. The Court said that a number of other states imposed a minimum term of 10 years or more, but did not preclude the possibility of parole during that period.

Coker v Georgia, supra, 53 LEd2d at 989-90, n.4: "We observe that in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system."

As explained in the Lynch case: "Here the assumption is that the vast majority of those jurisdictions will have prescribed punishments for this offense that are within the constitutional limit of severity; and if the challenged penalty is found to exceed the punishments decreed for the offense in a significant number of those jurisdictions, the disparity is a further measure of its excessiveness."²

2. APPLICATION.

Nelson Rockefeller did not exaggerate in referring to his new drug legislation as the "toughest" in the nation. No other state imposes a mandatory life term for the sale of narcotics.

California requires that any sentence of imprisonment for the sale of narcotics be five years to life, with ineligibility for parole for three years,³ however, it permits a first offender to be placed on probation.^{3a} Further, the life term that may be imposed is not comparable to New York's. It is part of California's general indeterminate sentencing structure which places the actual determination of the maximum sentence in the hands of the Adult Authority (Parole Board). The Adult Authority decides not only when a prisoner is to be released on parole, but at what lesser term than

³ Calif. Health & Safety Code, Sec. 11352 (a). See Appendix (A28), State & Federal Penalties for Sale of Narcotics, Table 1, Generally.

^{3a} Calif. Penal Code, Sec. 1203 (d,e), lists persons and offenses for which, except in unusual cases, probation is not available. The sale of controlled substances is not one of the crimes listed, so one convicted of that offense is eligible for probation unless he is a second felony offender (for whom probation is not available, Penal Code Sec. 1203 (d) (2)).

life he is to be discharged from his sentence; lifetime parole is not contemplated by the statute.⁴ (California recently voided as cruel and unusual its mandatory 20-year minimum sentence without parole for the sale of narcotics.)⁵ Moreover, California does not surround its life sentence provisions with the New York-type procedural restrictions of disallowing pleas to lesser included offenses when a life sentence would be too severe under the circumstances.

Although the Louisiana Penal Code provides that life imprisonment "shall" be imposed on anyone convicted of a narcotics sale,⁶ its Code of Criminal Procedure provides that, where the best interest of the public and defendant will be served, the court may suspend sentence for a first felony, non-capital conviction under the Controlled Dangerous Substances Law (or for a multiple offender if he participates in a narcotics rehabilitation program), and place the offender on probation for a term of from 1 to 5 years.⁷ The Court may discharge the offender from probation at any time after 1 year,⁸ and, if the probation term has been served satisfactorily, may set aside the judgment and dismiss the prosecution.

⁴ See Calif. Penal Code Secs. 3020-3025; In re Lynch, supra, 503 P2d at 925.

⁵ In re Foss, supra.

⁶ LSA-RS Secs. 40.966 (B) (1), 40.982.

⁷ LSA-C.Cr.P., Art. 893.

⁸ LSA-C.Cr.P., Art. 897.

⁹ LSA-C.Cr.P., Art. 893.

A literal reading of the Louisiana statutes produces the odd result of requiring the court to sentence a narcotics sale offender to either a short term of probation or life imprisonment, with nothing in between.

Louisiana, however, has very liberal "good time" and commutation provisions. Although a prisoner serving a life sentence is not eligible for parole¹⁰ or good time¹¹ until his sentence has been commuted to a term of years, once that has been done, he is eligible for parole after serving 1/3 of his maximum¹² and earns¹³ 25 days a month good time toward the diminution of his sentence. Life sentences may be commuted to not less than 10 1/2 years when the prisoner "so conducts himself as to merit the approval of the superintendent of the state penitentiary",¹⁴ and a reading of this statute in light of a La.Sup.Ct. case¹⁵ and of an Opinion of the Attorney General¹⁶ leads to the conclusion that commutation in

¹⁰ LSA-RS Sec. 15.574.4 (B).

¹¹ LSA-RS Sec. 15.571.3 (B).

¹² LSA-RS Sec. 15.574.4 (A).

¹³ LSA-RS Sec. 15.571.4 (B), Good time is awarded" on the basis of a thorough evaluation of the individual inmate's behavior, work performance and efforts toward self improvement."

¹⁴ LSA-RS Sec. 15.571.7.

¹⁵ See State v. Satcher, 124 La. 1015, 50 So 835 (1910), saying that a life imprisonment sentence for murder "is subject to commutation for good time service according to law" and that "the party so sentenced might, by good behavior, have his term of imprisonment shortened to 15 years".

¹⁶ See La. Ops. Atty. Gen. 1922-24, p. 827, saying that if a life prisoner were to have his sentence commuted at the end of 15 years,

Louisiana, instead of being simple a matter of grace, is "earned" in substantially the same manner as "good time". Furthermore, the parole board may suspend supervision of any parolee whom it considers to no longer be in need of guidance and supervision.¹⁷

Four states (Arizona, Missouri, Montana and Texas)¹⁸ authorize the sentencing judge to impose a life term, but do not require it, and all have low minimum sentences of from 1 to 5 years. Two of these states (Arizona and Texas) specify that probation is available, and the other two do not preclude it.

Another handful of states (New Mexico, Ohio, Virginia, Mississippi, and Delaware) authorize, but do not require, maximum terms varying from 25 to 50 years.¹⁹

The vast majority of states authorize maximum terms ranging from 1 to 20 years:²⁰

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"he must have so conducted himself as to merit approval of the board of control, and in order for him to earn a commutation within a shorter period, he must have further earned eligibility by particularly meritorious service or highly exemplary conduct."

¹⁷ LSA-RS Sec. 15.574.7. However, the parole board may not "discharge" the parolee prior to the expiration of his sentence. LSA-RS Sec. 15.574.6.

¹⁸ See Appendix, A1, Table 1.

¹⁹ See Appendix, A1, Table 1.

²⁰ See Appendix, A1, Table 1.

The federal drug laws provide for a discretionary life sentence only for a "continuing criminal enterprise", in which the felony drug offense must have been undertaken by the defendant in concert with 5 or more other persons, and then only if the defendant was an organizer, supervisory, or manager of the enterprise and obtained substantial income or resources from that enterprise. 21 U.S.C. §848.

<u>1 Year</u>	<u>5 Years</u>	<u>10 Years</u>	<u>15 Years</u>	<u>20 Years</u>
District of Columbia	Arkansas Florida Vermont	Alaska Connecticut Georgia Hawaii Iowa Kansas Kentucky Massachusetts North Carolina North Dakota Oregon South Dakota Washington	United States Alabama Idaho Minnesota South Carolina Tennessee Utah West Virginia Wisconsin	Colorado Illinois Indiana Maine Maryland Michigan Nebraska Nevada New Hampshire Oklahoma Pennsylvania Rhode Island Wyoming

The New York Court of Appeals noted that drug trafficking is more extensive in New York than any other state and that this more prevalent crime problem must be weighed in any "external" comparison of penalties.^{20a}

We do not disagree that this is a factor to be weighed. We would disagree, however, that this factor is controlling. The more prevalent crime problem, for instance, does not excuse the following:

Rockefeller designed his new drug legislation with the worst offenders in mind, by lumping together for sentencing purposes every person who gives, exchanges, or sells narcotics to another, regardless whether he is a capitalistic pusher or one selling solely to support his habit, whether he gave it to a friend to get him through withdrawal pains, whether he sold to an adult or a youth, etc.

^{20a}
(1975) People v Broadie, 37 NY2d 100, 116, 371 N.S2d 471, 480

Many other states distinguish among these categories, authorizing extended terms for for one who sells narcotics to a minor, particularly if the seller is more than 3 years older than the buyer,²¹ for such non-addict sellers²² and for one who has previously been convicted of a narcotics²³ or narcotics sale²⁴ offense.

²¹ See Appendix, A3, Table 2, Extended Terms for Sales to Youth.

²² See Appendix, A3, Table 3, Extended Terms for non-addict sellers.

²³ See Appendix, A4, Table 4, Extended Terms for 2nd or 3rd Narcotics Conviction.

²⁴ See Appendix, A6, Table 5, Extended Terms for 2nd Narcotics Sale Conviction.

E. PENALTIES RECOMMENDED BY RESPECTED AUTHORITIES.

1. LEGAL PRINCIPLES.

As part of the comparative law approach to the excessiveness of penalties under the 8th Amendment, some courts have given weight to the views of the draftsmen of respected model legislation.¹ The United States Supreme Court has had no occasion to rely on model legislation in the context of the 8th Amendment, although it has² relied on such models in other areas of sentencing.

This is a natural outgrowth of the examination of laws in other jurisdictions, and provides what is probably a more rational guideline to public opinion enlightened by a "humane justice" and "contemporary human knowledge"--the general standard set by the United States Supreme Court for resolving 8th Amendment questions.³

¹ In Re Lynch, supra, 503 P2d at 933, 939, according weight to the A.L.I. Model Penal Code and the proposed Federal Criminal Code of the National Commission of Reform of Federal Criminal Laws.

In re Foss, supra, 112 Cal Rptr at 660-61, according weight to the Model Sentencing Act of the Advisory Council of Judges of the National Council on Crime and Delinquency and to the ABA Minimum Standards of Criminal Justice Relating to Sentencing.

People v Lorentzen, supra, 194 NW2d at 833, according weight to the Model Sentencing Act and the Model Penal Code.

² See, for example, Williams v New York, 337 US 241, 246-48, 93 LEd 1337, 1342-43, 69 Sct 1079 (1949).

³ See Section on Legal principles, generally, of this brief, pp. 22-23.

2. APPLICATION.

There is substantial agreement on the following recommendations made by all the major, respected model legislation and reports:⁴

1. The Model Penal Code of the American Law Institute (1962);
2. The Model Sentencing Act of the Advisory Council of Judges of the National Council on Crime and Delinquency (1963);⁵
3. The American Bar Association's Minimum Standards for Criminal Justice Relating to Sentencing Alternatives and Procedures (1968);⁶ and
4. The President's Commission on Law Enforcement and Administration of Justice; Task Force on the Court and Task Force on Corrections (1968).⁷

All agree that the legislature should never require imprisonment for any category or offense, with the possible exceptions of murder, kidnapping, and treason, but should give the sentencing judge power to choose without restriction among the alternative

⁴ This will be referred to as the Model Penal Code.

⁵ This will be referred to as the Model Sentencing Act.

⁶ This will be referred to as the A.B.A. Standards.

⁷ This will be referred to as the President's Task Force on Courts or Corrections. The report is entitled The Challenge of Crime in a Free Society; A Report by the President's Comm. on Law Enforcement and Administration of Justice. Citations will be given to both the official government edition (off.ed.) and to the popular edition published by Avon Books (Avon Bks. ed.).

sentences available, including probation.⁸ ". . . no legislative definition or classification of offenses can take account of all contingencies. However right it may be to take the gravest view of an offense in general, there will be cases comprehended in the definition where the circumstances were so unusual, or the mitigations so extreme, that a suspended sentence or probation would be proper."⁹ The legislature is simply not in a position to identify those persons who pose the most feared dangers.¹⁰ Specific criteria have been recommended to guide the courts in determining when to place a person on probation or impose a suspended sentence.¹¹

Mandatory minimum terms of imprisonment are proscribed by the model legislation for similar reasons,¹² in addition to which they

⁸ Model Penal Code Sec. 6.02 (3); Model Sentencing Act, comment at p. 13; A.B.A. Standards, Secs. 2.1 (b-c), 2.3(a), 3.2(a); President's Task Force on the Courts, (off.ed.), p. 143, (Avon Bks. ed.), pp. 351-52.

⁹ Model Penal Code, comment in Tent. Draft No. 2, p. 13; A.B.A. Standards, comment at p. 66.

¹⁰ A.B.A. Standards, comment at p. 148, saying that, eg., the youth who can't find work, panics, and robs to feed his family does not pose the same potential danger to society as the sociopath who robs because he finds it a convenient way to make a living.

¹¹ Model Penal Code, Sec. 7.01; President's Task Force on Corrections, (off. ed.), pp. 179-80, (Avon Bks. ed.), pp. 426-27. See also A.B.A. Standards Relating to Probation, Secs. 1.2, 1.3, and commentary at pp. 26-32.

¹² Model Sentencing Act, comment at p. 13; A.B.A. Standards, Secs. 2.1(c), 3.2 (a); President's Task Force on the Courts, (off ed.), p. 143, (Avon Bks. ed.), p 351.

deny or unduly delay the parole board from releasing a prisoner on parole at the point where it is most likely to produce a suitable result.¹³

Removal of long maximum terms of imprisonment is also recommended.¹⁴ The model legislation uniformly suggests 5 years as the maximum authorized sentence for almost all felonies.¹⁵ The only exceptions are for the most dangerous crimes of murder, treason, kidnapping (unless the defendant releases the victim alive and in a safe place prior to trial), forcible rape, armed robbery, mayhem, and bombings, for which a 10-year authorized maximum is considered the outer limit,¹⁶ and for especially dangerous categories of offenders (the habitual felon, professional criminal, or particularly dangerous person), for which discretionary, extended terms of up to 20 and 30 years are recommended.¹⁷ In other words, lengthy

¹³ A.B.A. Standards, commentary at p. 55; Model Sentencing Act, comment at p. 13.

¹⁴ See Also, President's Task Force on the Courts, (off. ed.), pp. 142-143, (Avon Bks. ed.), pp. 350-52.

¹⁵ Model Sentencing Act, Sec. 9; Model Penal Code, Sec. 6.06; A.B.A. Standards, Sec. 2.1 (d).

¹⁶ Model Sentencing Act, Sec. 8, which would, however, in Sec. 7, authorize a life term for murder; Model Penal Code, Sec. 6.06, which would, however, raise the authorized maximum to 20 years or discretionary life for the crimes of murder and kidnapping as defined above; Model Penal Code, Secs. 210.2(2), 212.1; A.B.A. Standards, Sec. 2.1 (d).

¹⁷ Model Sentencing Act, Secs. 5-6; Model Penal Code, Sec. 7.03; A.B.A. Standards, Secs. 2.1(d), 2.5, 3.1(c), 3.3. The categories of persistent offender, professional criminal, dangerous, mentally abnormal person, multiple offender whose criminality was extensive are carefully defined in Model Penal Code, Sec. 7.03. See also, President's Task Force on the Courts, (off. ed.), p. 143, (Avon Bks. ed.), p. 427.

prison terms are reserved for those who have committed particularly heinous crimes or crimes seriously endangering the life or safety of other people, or "those offenders whose personal instability is so gross as to erupt periodically in violent and assaultive behavior, and those individuals whose long-term exposure to criminal influences has produced a thoroughgoing commitment to criminal values that is resistive of superficial efforts to effect change."¹⁸

The draftsmen point out that America's prison sentences are generally longer than those in England and Europe, which rarely exceed 5 years.¹⁹ High maximums make a gap of many years between the earliest parole date and the maximum sentence, creating dangers of unfairness and loss of respect.²⁰

More importantly, prison wardens generally agree that only a few of their prisoners can really be considered dangerous.²¹ The fact that there are offenders who pose a significant public danger "should not lead to the conclusion that offenders who do not pose

¹⁸ President's Task Force on the Courts, (off. ed.), p. 180, (Avon Bks. ed.), p. 427.

¹⁹ A.B.A. Standards, commentary at p. 57; President's Task Force on the Courts, (off. ed.), p. 142, (Avon Bks. ed.), p. 350.

²⁰ President's Task Force on the Courts, (off. ed.), p. 142, (Avon Bks. ed.), p. 350; A.B.A. Standards, commentary at p. 61.

²¹ A.B.A. Standards, commentary at p. 58.

such a danger should be committed for a substantial period of time because the offense they committed happens to be one that is often committed by dangerous people."²²

Another factor considered by the commentators is the affirmative harm which can result from the "prisonization" of and resentment by the offender, which has a serious impact both on the offender and on the community to which he eventually returns upon his release on parole.²³

Especially where high maximums are involved, the Model Penal Code suggests that the parole board be given the power to discharge a person from parole prior to the expiration of his maximum sentence when it concludes that he no longer requires guidance and supervision and where it would not be incompatible with the public safety.²⁴ A policy that requires continued parole supervision over many years without regard to the parolee's conduct and attitude, is demoralizing to the parolee, counterproductive, and excessively costly to the state.²⁵

The commentators condemn the practice of imposing lengthy, mandatory sentences and placing exclusive reliance on the parole

²² A.B.A. Standards, commentary at p. 148.

²³ A.B.A. Standards, commentary at p. 59.

²⁴ Model Penal Code, Sec. 305.12.

²⁵ Model Penal Code, Tent. Draft No. 5, comment at p. 101.

authorities for determining how long the prisoner should remain incarcerated on the additional ground that the parole officials in most states are still political appointees with little training, have developed no real guidelines or expertise, and in general have not developed to a level compatible with trusting them to a decision which is as or more complex and important as that made²⁶ by the sentencing judge.

Finally, the President's Task Force on Narcotics and Drug Abuse specifically decried the use of mandatory minimum sentences for narcotics offenders, saying that differences exist in the circumstances and nature of the illegal conduct and in the offenders²⁷ within any classification of offenses, and that the "drug laws should give a large enough measure of discretion to the courts and correctional authorities to enable them to deal flexibly with violators, taking account of the nature and seriousness of the offense,²⁸ the prior record of the offender and other relevant circumstances."

²⁶ A.B.A. Standards, commentary at p. 136; President's Task Force on Corrections, (off. ed.), p. 181, (Avon Bks. ed.) pp. 429-30.

²⁷ President's Commission, Task Force on Narcotics and Drug Abuse, supra, (off. ed.), p. 223, (Avon Bks. ed.), p. 512.

²⁸ Id., (off. ed.), p. 223, (Avon Bks. ed.), p. 513.

Thus, as acknowledged by the New York Court of Appeals, all the major, respected model legislation and reports condemn by a wide margin every feature of the New York sentencing scheme for class A-III drug-related felony offenders.

29
People v. Broadie, 37 NY2d 100, 114, 371 NYS2d 471, 478, (1975: "... there is considerable highly-respected authority which questions the wisdom of eliminating flexible sentencing standards in drug cases in favor of long, mandatory prison terms.

F. EFFECT ON EXCESSIVENESS OF PAROLE BOARD'S POWERS.

1. LEGAL PRINCIPLES.

In a South Carolina case in which a 30-year sentence (extending beyond the defendant's life expectancy) was held violative of the 8th Amendment as applied to an unaggravated first offense burglarly case, the state suggested that the defendant would probably not be required to serve the full term imposed because of eligibility for good time and release on parole. The Court rejected this argument, saying that: "Pardon, parole or commutation is an act of grace and a matter of discretion, and may be refused. A just sentence is imperative and must not be denied."¹

The Idaho Supreme Court, considering a similar contention concerning a life sentence for lewd conduct committed on a minor, noted that the parole board is not a judicial tribunal empowered to impose sentence or competent to determine constitutional questions, and that it cannot be counted on to release the defendant whenever further incarceration would be cruel and unusual. The parole board's function is clemency, said the Court, and release on parole is a matter of discretion which may be refused. The constitutionality of the mandatory life sentence statute must therefore be determined not by what clemency might be exercised by the parole board, but by what might be done with its fullest authority, which² is to keep the defendant in prison for the remainder of his life.

¹ State v Kimbrough, 212 SC 348, 46 SE2d 273, 277 (1948).

² State v Evans, 73 Idaho 50, 245 P2d 788, 794 (1952).

Even in California, where the Adult Authority (parole board) has power when dealing with the indeterminate one-year-to-life sentences not only to release the defendant on parole, but also to "redetermine" the maximum term of the sentence whenever appropriate,³ the California Supreme Court, in making its determination whether the maximum term imposed is constitutional, has disregarded the parole authority's discretionary power to subsequently ameliorate the sentence. "If the purpose of the indeterminate sentence law is thus to mitigate a punishment which 'would otherwise be imposed', said the court, "the greater punishment must itself be one which it is within the power of the Legislature to decree. . . not a lesser period thereafter fixed as an 'incentive to well-doing'."⁴ Since the legal effect of the indeterminate sentence is a sentence for the maximum term, concluded the court, the constitutional validity of the sentence must be judged by that maximum.⁵

The New York Court of Appeals agreed with the California Court and held that the maximums must be examined, whether they be for long or lifetime imprisonment or parole.^{5a} Also in agreement that the severity of the N.Y. drug law must be judged by the maximum term of life imprisonment, is the U.S. District Court for the Southern District of N.Y.⁶

³ In re Lynch, supra, 503 P2d at 925.

⁴ Ibid.

⁵ Id., 503 P2d at 924-26.

^{5a} People v. Broadie, 37 NY2d 100, 111, 371 NYS2d 471, 475 (1975)

⁶ United States ex rel. Carmona v Ward, ___ F Supp ___, 21 CrL 2475 (S.D.N.Y., 1977), decision pending in Second Circuit, Docket No. 77-2110.

Even assuming that a defendant will be released on parole after a reasonable period of incarceration under a life sentence, lifetime parole status may itself constitute cruel and unusual punishment. Lifetime parole following a mandatory 12-year sentence for falsifying government records was declared cruel and unusual⁸ by the United States Supreme Court in Weems v. United States.

The Attorney General argued below that the court, in Weems, condemned only the 12-year minimum period of imprisonment required under the statutory punishment of cadena temporal, but did not⁹ reach the constitutionality of the lifetime surveillance feature. That is not true.

The Philippine Code penalty of cadena temporal under consideration in Weems consisted of a principal penalty of 12 years and a day to 20 years' imprisonment at hard and painful labor while chained from the ankle to the wrists, and "accessory penalties" of civil interdiction (loss of property rights and marital and parental authority, etc.), perpetual absolute disqualification (from rights to vote, hold office, receive retirement pay, etc.), and subjection to lifetime surveillance.¹⁰ The principal and accessory penalties¹¹ were united by the Code and were not separable.

⁸ Weems v United States, 217 US 349, 54 LEd 793 (1910).

⁹ Attorney General's Brief, p. 15 and N.5 in People v. Broadie, 37 NY2d 100, 371 NYS2d 471, (1975)

¹⁰ Weems v. United States, supra, 217 US at 364, 54 LEd at 797.

¹¹ Id., 217 US at 382, 54 LEd at 804.

After discussing the imprisonment features of this punishment for false entries in government records, the court said that the "'accessories' must be brought into view", continuing:

"His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the 'authority immediately in charge of his surveillance', and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty."¹²

After thus condemning the essence of lifetime parole, the Court concluded that the penalty of cadena temporal "is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind."¹³

2. APPLICATION.

The President's Task Force on Corrections and the A.B.A. Minimum Standards of Criminal Justice Relating to Sentencing condemn the practice of imposing lengthy, mandatory sentences and placing exclusive reliance on the parole authorities for determining

¹² Id., 217 US at 366, 54 LEd at 798.

¹³ Id., 217 US at 377, 54 LEd at 802.

how long a prisoner should remain incarcerated. This condemnation rests partly on the ground that parole officials in most states are still political appointees with little training, have developed no real guidelines or expertise, and in general have not developed to a level compatible with trusting them to make a decision which is as or more complex and important as that made by a sentencing judge.¹⁴

New York provides no exception to this criticism. Political patronage, without much regard for merit or ability, appears to play an important role in N.Y. parole board appointments:¹⁵ there are no established qualifications or requirements for experience in corrections, psychology, or social work.¹⁶

The New York Parole Board has established no guidelines for its parole release decisions, and readily reacts to political interference and popular pressures.¹⁷

¹⁴ President's Commission on Law Enforcement and Administration of Justice, Task Force on Corrections, (off.ed.), p. 181, (Avon Bks. ed.), pp. 429-30; A.B.A. Minimum Standards of Criminal Justice Relating to Sentencing, commentary at p. 136.

¹⁵ Citizens' Inquiry on Parole and Criminal Justice, Inc., Prison Without Walls; Report on New York Parole (Praeger, N.Y., 1975), pp. 10-11. (mimeo) pp. 19-21. Since the March 5, 1974 mimeographed report by Citizens' Inquiry was given wide distribution before the report was published, citations will be given to page numbers of both the published (pub.) and mimeographed (mimeo) reports.

Citizens' Inquiry is an ad hoc group chaired by former U. S. Attorney General Ramsey Clark.

¹⁶ Report on New York Parole, supra (mimeo) p. 18, (pub.) p. 9.

¹⁷ Attica: The Official Report of the New York State Special Commission on Attica (Bantam Bks., N.Y., 1972), pp. 93-98; Report on New York Parole, supra, (mimeo) pp. 92 ff., esp. pp. 116-19 (pub.) pp. 52 ff., esp. 59-61; United States ex rel. Johnson v. Chairman of N.Y. St. Board of Parole, 500 F.2d 925, 929, 931-33, (CA2, 1974). vacated as moot, 419 US 1015 (1974).

So long as the parole board does not violate any "positive statutory requirement" in denying parole, its discretion is absolute and beyond review by the courts.¹⁸

The average time of the parole release hearing, including the time for reading the inmate's file (often as long as 150 pages) and deliberation among the three Commissioners present, is 5.9 minutes. Two of the commissioners often read the files of the inmate next in line while the inmate under consideration is questioned by the third commissioner and there is no time for later study of the files. Questions are often superficial, and usually concentrate on the inmate's past crime, rather than on his present condition or plans for the future. No one who worked with the inmate in prison is heard by the board.¹⁹

Once released, a narcotics sale offender remains on parole for life, subject to parole rules that govern almost every aspect of his life.²⁰ Arbitrary enforcement of the rules is not uncommon, and parolees are returned to prison for the violation of any one of them, including such things as violating curfew, violating traffic laws, associating with a person having a criminal record

¹⁸ Hines v. State Board of Parole, 293 NY 254, 257 (1944).

¹⁹ Attica, etc., supra, p. 96; United States ex rel, Johnson v. Chairman of N.Y. St. Board of Parole, supra, 500 F2d at 931-32.

²⁰ See 7 NYCRR Sec. 1.15, for the rules imposed on all parolees, subject to special rules being added for a particular parolee. See Report on New York Parole, supra, (mimeo) pp. 170-223 (pub.) pp. 98-128.

even if unknown to the parolee and even if only for a short time on one occasion), or being "suspected" of not leading a law-abiding life or "being in danger" of falling into criminal ways.²¹ While on parole, the parolee and his residence, or property, may be searched at any time, day or night, for any reason, or no reason at all.²²

The narcotics sale offender remains on parole for the duration of his life, (unless sooner discharged by the parole board, in its discretion), and subject at any time to being retaken for the violation of any condition of parole, and returned to prison, from which he might or might not again be released on parole. Indeed, there is no assurance that he will be released in the first instance, whether or not warranted by his behavior and attitude, and there is nothing the courts can do about it under present rules of judicial review.

The parole board may, in its discretion, release a prisoner on parole if it finds a "reasonable probability" that the prisoner would "remain at liberty without violating the law" and that his release "is not incompatible with the welfare of society" and would "not so deprecate the seriousness of his crime as to undermine respect for the law".²³

The Second Circuit characterized this standard as "extremely vague" and as vesting the board, whose competence to make such predictions had been "questioned", with "apparently unfettered discretion".²⁴

²¹ Corr. L. §§215-16; 7 NYCRR §1.13; Report on New York Parole, supra, (mimeo) pp. 224-37, (pub.) pp. 129-36; Attica, supra, pp. 99-101.

²² 7 NYCRR §1.15(4)(c).

²³ Exec. L. §259-1(2)(c) (former Corr. L. §213).

²⁴ United States ex rel. Johnson v Chairman, N.Y. St. Bd. of Parole, 500 F2d 925, 929 (CA2, 1974), vacated as moot, 419 US 1015 (1974). This case was decided before the 1977 amendment, which added the condition that release no deprecate the seriousness of the crime, L. 1977, ch. 904.

Denationalization as a punishment for wartime desertion was found by the Supreme Court to be proscribed by the 8th Amendment, among other reasons, because it destroyed the expatriate's political status, resulting in his loss of the "right to have rights" by depriving him of the rights reserved to citizens and subjecting even his limited rights as an alien to termination at will by deportation, and subjecting him to a fate of ever-increasing fear and distress. It is no answer to suggest that these disastrous consequences might never occur," said the court, "the threat makes the punishment obnoxious."²⁵

In addition to the possible lifetime imprisonment feature of the New York drug laws which involves the substantial loss of practically all constitutional rights, lifetime parole involves not merely a "threat", but an actual, permanent loss and severe restrictions on many fundamental constitutional rights normally guaranteed even to aliens, including the rights of privacy, association, travel, voting, and freedom from unreasonable searches. The perpetual surveillance and supervision of the parolee, along with the ever-present possibility of being re-incarcerated for life for violation of technical rules of parole which govern minute details of everyday living, subjects the parolee to fear and distress surpassing that of any expatriate or of one under the lifetime surveillance of cadena temporal.

²⁵ Trop v Dulles, 356 US 86, 101-02, 2 LEd2d 630, 643, 78 Sct 590 (1958)(plurality op. by Warren, C.J.).

POINT II

LACK OF MEASURABLE CONTRIBUTION TO ACCEPTABLE GOALS OF PUNISHMENT
RENDERS PENALTY VOID UNDER 8th AMENDMENT.

A. LEGAL PRINCIPLES.

Under Coker and Gregg, the U.S. Supreme Court established alternative grounds¹ on which a punishment would be unconstitutionally excessive under the 8th Amendment cruel and unusual punishment clause. Even if the punishment is not grossly out of proportion to the severity of the crime, it will nevertheless be voided if it:

"makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."²

The recognized, acceptable goals of punishment are rehabilitation, punishment, isolation to protect society, and deterrence.² However, as noted by the N.Y. Court of Appeals, "There is no place in the scheme of punishment for its own sake, the product simply of vengeance or retribution."³ And, as noted by the U.S. Supreme Court, the purposes of punishment are fulfilled "by penalties of just, not tormenting, severity".⁴

¹ Coker v Georgia, supra, 53 LEd2d at 989 & n.4, made it clear that these grounds were alternative; that a punishment which is disproportionate for the crime is cruel and unusual even if it may measurably serve acceptable goals, and vice versa.

² Coker v Georgia, supra, 53 LEd2d at 989; Gregg v Georgia, supra, 428 US at 173, 49 LEd2d at 875.

³ Williams v New York, 337 US 241, 248, n.13, 93 LEd 1337, 1343, n.13, 69 Sct 1079 (1949); Weems v United States, supra, 271 US at 381, 54 LEd at 804; People v Oliver, 1 NY2d 152, 160 (1956).

⁴ People v Oliver, supra, 1 NY2d at 160.

⁵ Weems v United States, supra, 271 US at 381, 54 LEd at 804.

B. APPLICATION.

1. EXISTING REHABILITATION PROGRAMS.

The New York Court of Appeals noted that the new drug laws were enacted "after thorough investigation".²¹ It is true that the laws were enacted "after" thorough investigation, but hardly in response to it. The new laws and the reasons assigned to them run counter to both the factual findings and the recommendations of those investigative bodies.

It is puzzling to read Rockefeller's 1973 message, "confessing" to the abject failure of all the drug rehabilitation programs he had tried and the lack of any alternative except mandatory life sentences, and to compare it with the reports of his own New York Temporary State Commission to Evaluate the Drug Laws, issued at the same time, which proclaim precisely the opposite.²²

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People v Broadie, 37 NY2d 100, 117, 371 NYS2d 471, 481 (1975).

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Moreover, one week after the governor's annual message and four months before passage of the legislation, the governor's counsel solicited and received a special memorandum from Harvard Hollenberg, Chief Counsel for the Commission, which was highly critical of both the facts and conclusion in Rockefeller's proposal and which expressed grave doubts about its constitutionality. N.Y.T., January 11, 1973, p. 1, c.2.

The New Jersey legislative drug commission was similarly puzzled about this discrepancy, and could locate no statistics to support Governor Rockefeller.²³

In 1973, the New York Commission reported that in New York City, arrests for all those admitted to methadone maintenance programs declined 74% and that arrests for those on methadone maintenance 13 months or longer declined 96%.²⁴ It further noted that the era of major diversion of methadone was coming to an end because of new regulatory laws.²⁵ The Commission also said that lack of acceptance and the unavailability of jobs for addicts was one of the major impediments to rehabilitation, and that New York was well on the way to remedying that problem with new legislation proposed by the Commission to end unwarranted job discrimination against addicts in treatment programs.²⁶ Addicts stabilized on

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The New Jersey legislative report noted that no major study was made prior to the new law which showed that New York's efforts to contain addiction had failed, but rather, statistics indicated that heroin use in New York had already declined somewhat at the time of Rockefeller's message, that there had been a decline in drug related crimes, narcotic deaths, and in the number of prisoners requiring detoxification from heroin. New Jersey "Drug Study Commission", First Report to the Legislature (Oct. 1974), supra, p. 162.

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N.Y. Temp. State Comm. to Evaluate Drug Laws rpt., "Employing the Rehab. Addict", supra, p. 11.

25

Ibid.

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N.Y. Temp. State Comm. to Eval. Drug Laws rpt., "How People Overseas Deal with Drugs", supra, p. 48.

methadone, said the Commission, "are either indistinguishable from²⁷ or even better than other workers with similar capacities."

Far from expressing the complete failure of the New York programs, as asserted by Rockefeller, the Commission concluded that:

"For the first time, there are indications that we are turning back the flood tide²⁸ which had been building from 1946 to 1972."

The recent high degree of success of methadone maintenance programs (in New York, the United States, and England) in making heroin addicts socially productive and decreasing criminality among them has also been documented by the National Commission on Marihuana and Drug Abuse,²⁹ the Canadian Commission of Inquiry into the Non-Medical Uses of Drugs (the LeDain Commission),³⁰ and Consumer Reports.³¹

It is true that methadone maintenance, therapeutic communities, antagonist treatment, and drug-free treatment are still unable

²⁷ N.Y. Temp. State Comm. to Eval. Drug Laws rpt., "Employing the Rehab. Addict", supra, p. 7.

²⁸ N.Y. Temp. State Comm. to Eval. Drug Laws rpt., "How People Overseas Deal with Drugs", supra, p. 52.

²⁹ Nat'l Comm. on Marihuana and Drug Abuse, 2nd Rpt., supra, pp. 162, 176-81, 319-23.

³⁰ Canadian Comm. of Inquiry Into the Non-Medical Uses of Drugs, Treatment Report (Information Canada, Ottawa, 1972), pp. 23-30.

³¹ Consumers Union Report, Licit and Illicit Drugs, supra pp. 135-52.

to attract or rehabilitate all heroin addicts (although success in recent years has been rather high), but it is untrue that all alternative treatment modalities have been exhausted. One major successful treatment program-- heroin maintenance-- has not yet been attempted in New York.

2. HEROIN MAINTENANCE PROGRAM.

Whatever else might be said about heroin maintenance, it is undeniable that Great Britain has had almost no crime problem associated with its addict population because of its combined heroin-methadone maintenance program. This has been confirmed by Scotland Yard and the British Home Secretary,³² among others.³³

A 1969 study³⁴ of a small sample of 25 Canadian heroin addicts who had immigrated to England 7 years earlier and were still addicts, showed that:

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New Scotland Yard Commander Robert Huntley and British Home Secretary Roy Jenkins, quoted in Horace Freeland Judson, Heroin Addiction in Britain; What Americans Can Learn from the English Experience (Harcourt Brace Jovanovich, New York, 1974) pp 48-49, 90-91, See also p. 136 and citations at p. 176.

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Stuart M. Israel & Ronald F. Denardis, "The Irrationality of a Law Enforcement Approach to Opiate Narcotics", 50 J Urban L 631, 678 (1973); Licit and Illicit Drugs, supra, p. 123.

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J. Zacune, "A Comparison of Canadian Narcotic Addicts in Great Britain and in Canada " 23 Bull. on Narcotics, 41-49 (1971), cited in The Technical Papers of the Second Report of the Nat'l Comm. on Marihuana and Drug Abuse, supra, Appendix, vol. IV, p. 176 at p. 194; Judson, Heroin Addiction in Britain, supra, pp. 50-51.

(a) While in Canada, the group had spent 1/4th of their time in prison after becoming addicted, but only 1/50th of their time in prison in the 7 years after they moved to England where they could legally obtain their drugs. In Canada, 23 of the 25 had been convicted an average of 7 times each, (half for theft) and had spent an average of 7 years in prison. In England, only 6 of the 25 had been imprisoned at all, averaging 2 1/2 years in prison.

(b) While in Canada, only 1 had worked steadily and 3 sporadically. In England, 13 were employed full time and had held their present jobs between 6 months and 7 years. This job record is remarkable considering their long criminal records and history of prior unemployment.

(c) Most were leading normal lives in England, although still addicted.

In America, a 1969 O'Donnell Study in Kentucky provides additional confirmation that drug prohibition, not drugs per se, causes crime, and that a heroin maintenance program might work in this country. A substantial, but diminishing number of Kentucky physicians have continued to prescribe opiates for their addicted patients ever since the Harrison Act was enacted.³⁵ This study showed that:

(a) Among 82 male addicts who secured all or almost all of their drugs illegally, 59 were convicted of crimes, most

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Licit and Illicit Drugs, supra, p. 129

several times, and 14 of them were convicted 6 or more times. Moreover, many of the remaining addicts supported themselves through daily crime for which they were not convicted.

(b) Among 45 male addicts who received their opiates legally from a physician, on the other hand, only 4 were ever convicted of any crime during the entire course of their addiction.³⁶

It should also be noted that crime was not associated with opiate addiction in pre-Harrison Act America, before the opiates were made illegal.³⁷

The National Commission on Marihuana and Drug Abuse made one caveat to its general recommendation against importing such a program to this country, saying that: "Still, if this country considers heroin dependence to be primarily a problem of crime (as Rockefeller's proposals did), then heroin maintenance would be an appropriate response."³⁸

The British experienced a rise in their addict population during the mid-sixties, due partly to prescriptive abuses by a few physicians before controls were tightened, partly to a brief American type response of media hysteria which simply drew attention to heroin, but due largely to new mandatory reporting laws which

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³⁶ Id., p. 133.

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³⁷ Id., p. 7.

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³⁸ Nat'l Comm. on Marihuana and Drug Abuse, 2nd Rpt., supra,
p. 335.

inflated statistics without reflecting actual increases in addicts.³⁹
The addict population has been stabilized since 1969,⁴⁰ and the
percentage of addicts under the age of 20 has dropped sharply.⁴¹
In addition to minimizing any drug-related crime problem, the
British approach has resulted in 20% of the addicts becoming drug-
free and 60% being able to function well in terms of social
criteria.⁴²

The combined heroin-methadone maintenance clinic program works
much better than methadone maintenance alone; the basic reason is
inducement. It attracts many more addicts to enter the thera-
peutic setting because they are not immediately deprived of either
the drug they are accustomed to or the prief euporia experienced
by some on heroin. Once at a clinic, the British experience shows
that the majority can eventually be persuaded to shift to methadone

³⁹ Licit and Illicit Drugs, supra, pp. 115-34; Canadian Commis-
sion of Inquiry into the Non-Medical Uses of Drugs, Treatment
Report, supra, pp. 19, 21; Josephson, "The British Response to Drug
Abuse", supra, Appendix, vol. IV, at p. 191, of the Technical
Papers of 2d Rpt. of Nat'l Comm. on Marihuana and Drug Abuse;
N.Y. Temp. St. Comm. to Eval. Drug Laws rpt., "How People Overseas
Deal with Drugs", supra, pp. 23, 29; Judson, Heroin Addiction in
Britain, supra, pp. 38-62, 98-99, 155-56.

⁴⁰ Ibid. Moreover, at least 90% of the addicts in England were
registered in the Home Office Index. Judson, Heroin Addiction in
Britain, supra, pp. 99, 105-06, 135.

⁴¹ Judson, Heroin Addiction in Britain, supra, pp. 119, 155-56.

⁴² N.Y. Temp. St. Comm. to Eval. Drug Laws rpt., "How People
Overseas Deal with Drugs", supra, p. 26.

and some to abstinence. The remainder (those who won't switch and those for whom methadone doesn't work) are still far better off, both for themselves and for society. The dependency is managed and transferred almost entirely from the illicit market to the controlled administration of heroin of reliable quality under medical supervision. This tears a gaping hold in the black market and virtually eliminates the need to commit property crimes to pay high, illicit prices for heroin. (Prices are low, even on the black market in Britain because of the heroin maintenance program, being 1/12th to 1/20th of American prices.) It reduces also the tendency of the black market to draw all addicts and peddlers together to form a self-perpetuating narcotics subculture with built-in incentives to hook additional people on drugs. It avoids the social disgrace and demoralization associated with criminality and it enables the clinic authorities and others to assist addicts in achieving better social and occupational adjustment. At the same time, the system substantially reduces the physical debilitation caused by unsterile administration techniques and the poverty life-style forced on most addicts because of the high cost of illicit drugs.⁴³

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Canadian Commission of Inquiry into the Non-Medical Uses of Drugs, Treatment Report, supra, pp. 18-21; Michael X. Morrell, "Maintenance of Opiate Dependent Persons in the United States: "A Legal Medical History", Appendix, vol. IV, p. 516 at 532, 551-52, of the Technical Papers of the 2nd Report of the Nat'l Comm. on Marijuana and Drug Abuse; Canadian Commission of Inquiry into the Non-Medical Uses of Drugs, Final Report, supra, p. 168; Judson, Heroin Addiction in Britain, supra, pp. 64, 104, 114, 144.

Moreover, it is cheap. While a heavy heroin habit in this country might run \$50.00 per day and higher on the black market,⁴⁴ the medical cost of that heroin is only a few pennies.

For these reasons, a closely controlled, combined heroin-methadone maintenance program has been recommended by many, including the A.B.A. Special Committee on Crime Prevention and Control,⁴⁵ the Vera Institute of Justice,⁴⁶ Consumers Union,⁴⁷ the Honorable Harold A. Stevens, Presiding Justice of the N.Y. Appellate Division for the First Department,⁴⁸ the Canadian LeDain Commission of Inquiry into the Non-Medical Uses of Drugs,⁴⁹ and, if crime control is to be considered the major goal, by the U.S. National Commission on Marihuana and Drug Abuse.⁵⁰

⁴⁴ Judson, Heroin Addiction in Britain, supra, pp. 7, 116-17, showing the cost per heroin pill to be 2 1/4 cents. See, to the same effect, Canadian Commission of Inquiry into the Non-Medical Uses of Drugs, Final Report, supra, p. 321; Licit and Illicit Drugs, supra, pp. 120-29.

⁴⁵ American Bar Assn., Special Committee on Crime Prevention and Control, New Perspectives in Urban Crime (A.B.A., Washington, D.C., 1972), p. 62.

⁴⁶ Charles E. Riordan and Leroy C. Gould, Proposal for the Use of Diacetyl Morphine (Heroin) in the Treatment of Heroin Dependent Individuals (Vera Institute of Justice, Inc., N.Y.C., 1972).

⁴⁷ Licit and Illicit Drugs, supra, p. 530.

⁴⁸ "2 Top Judges See Court Paralysis Under Drug Plan", N.Y.T., Jan. 6, 1973, p. 1, c.6, at p.18, c.6.

⁴⁹ Canadian Commission of Inquiry into the Non-Medical Uses of Drugs, Final Report, supra, pp. 168-70.

⁵⁰ Nat'l Commission on Marihuana and Drug Abuse, 2nd Report, supra, p. 335.

In addition, conservative news columnist Clayton Fritchey has endorsed a heroin maintenance program, noting that it had also been endorsed by Dr. Peter Bourne, now Director of the White House Office of Drug Abuse Policy, by the Massachusetts Council of Churches, and by a grand jury in San Diego, Calif., the foreman of which was a retired Marine Corps general.^{50a}

The key committees on policy and resolutions of the National League of Cities has endorsed decriminalization for possession and use of narcotics,^{50b} and the League is debating the feasibility of a heroin maintenance strategy.^{50c}

In a survey of 100 N.Y.C. judges and drug rehabilitation specialists by the N.Y.C. Addiction Services Agency issued in 1977, half of both groups recommended decriminalization, legalization, or heroin maintenance, a recommendation adopted by Jerome Hornblass, Commissioner of the Agency.^{50d}

^{50a} Clayton Fritchey, "It's Time to Stop Exploiting the 'Drug Crisis'", Rochester Democrat & Chronicle, Dec. 28, 1977, p. 16A, c. 2.

^{50b} "Decriminalize Drug Use--Cities League", Rochester Democrat & Chronicle, Dec. 1, 1976, p. 18A, c. 1.

^{50c} Clayton Fritchey, *supra*.

^{50d} Addiction Services Agency, A Survey on the Effects of Drug Laws: Preliminary Findings (N.Y.C. Addiction Services Agency, 65 Worth St., N.Y.C. 10013, Jan. 18, 1977), pp. 15-16.

Probably the single factor most responsible for these recommendations not having been implemented is simply that, as Horace⁵¹ Judson noted, Americans flinch at prescribing pleasure, no matter what the benefits.

All this is not to say that New York must try a heroin maintenance program. But it is to say that since present drug programs have become quite successful in the past 3 1/2 years, then New York may not constitutionally enact as severe a penalty as mandatory life imprisonment, especially where it also prohibits civil commitment of those addicts charged with class A felonies to existing drug rehabilitation programs,⁵² and especially if it refuses to try heroin maintenance.

What has been said about the effect of heroin, about the recent, relative success of the various rehabilitative programs, and about a heroin maintenance program should not be misconstrued. We do not advocate legalization or decriminalization of heroin. We do not advocate even very short sentences. The illegal sale of heroin should still be punished by law, and sale under certain circumstances, for example, indicating an attempt to hook unaddicted persons, should be punished severely. Indeed, if heroin maintenance clinics were in operation, the illegal sale of heroin

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Judson, Heroin Addiction in Britain, supra, p. 97.

⁵²

Mental Hygiene Law Sec. 31.25 (b) (3).

should be punished, if only because it is done outside medical channels, without medical supervision, and would impede the benefits obtained through the clinics, and because it would tend to spread the use of heroin.

3. FAILURE OF MANDATORY LIFE SENTENCES
TO MAKE ANY MEASURABLE CONTRIBUTION.

In 1975, the New York Court of Appeals, although declining to invalidate the new drug laws, admitted that:

"Their pragmatic value might well be questioned since more than a half-century of increasingly severe sanctions has failed to stem, if indeed it has not caused, a parallel crescendo of drug abuse...Perhaps only time will tell whether the course pursued will prove effective or will fail as every similar effort since the Harrison Act of 1914 has failed." ⁵³

In 1977, time told. The Assn. of the Bar of N.Y.C. and the Drug Abuse Council, Inc. formed a Joint Committee on New York Drug Law Evaluation, which issued its final report⁵⁴ in 1977 after 4 years of study under a LEAA grant. That report concluded that the 1973 drug law had had no effect on drug abuse, did not stem the tide of serious property crime, had no effect on the risk of incarceration, and in fact had led to fewer convictions.

The report concluded that not only had heroin use not been reduced in New York City because of the 1973 drug law,⁵⁵ but that the pattern of stable heroin use since then was not appreciably different from the average pattern of other east coast cities,⁵⁶ and that there was no indication that heroin use was brought under control in New York better than anywhere else.⁵⁷ These conclusions were based on studies of a variety of reliable indicators, including

⁵³ People v Broadie, 37 NY2d 100, 117-18, 371 NYS2d 471, 481-82 (1975).

⁵⁴ Assn. of the Bar of the City of New York/Drug Abuse Council, Inc., The Nation's Toughest Drug Law: Evaluating the New York Experience (Final Report of the Joint Committee on New York Drug Law Evaluation)(1977).

⁵⁵ Id., p. 35.

⁵⁶ Id., p. 41.

⁵⁷ Id., pp. 43-44.

the level of narcotics deaths, the level of serum hepatitis cases, interviews with drug treatment and police officials, the number of admissions into drug treatment, and the price and supply of heroin.⁵⁸

As measured by F.B.I. statistics, the rate at which felonious property crimes increased in the state of New York was virtually identical to the average increase in three nearby states (Maryland, Pennsylvania, and New Jersey), even though the rate of increase in these crimes had been somewhat lower in New York than in the other states before the 1973 drug legislation.⁵⁹ In New York City, there was actually a more rapid increase in felonious property crimes since the new law than that experienced in the comparison cities.⁶⁰

The report found that the risk of incarceration facing persons arrested for drug felonies remained substantially unchanged at about 11% from 1972 to 1976,⁶¹ and concluded that: "Drug traffickers as a group were not likely to see the new law as a serious threat."⁶²

Although an arrestee faced an increased risk of incarceration ~~because of the mandatory penalties once he had been convicted~~, this increase was discovered to have been largely offset⁶³ by steady decline in the proportion of drug felony arrests resulting in indictments,⁶⁴ a decline in the proportion of indictments resulting

⁵⁸ Id., pp. 33-35, 37, 40-53, 55-57, 59-63.

⁵⁹ Id., p. 59.

⁶⁰ Id., p. 61.

⁶¹ Id., p. 87.

⁶² Id., p. 16.

⁶³ Id., p. 87.

⁶⁴ Id., p. 93.

in convictions,⁶⁵ and a decline by almost half in the actual number of drug convictions between 1972 and 1975.⁶⁶

The New York Court of Appeals ruled that retribution was rejected as a basis for the new drug law, that rehabilitation efforts were considered by the legislature to have failed, and that the only goals sought for the new penalties were isolation and deterrence of drug use and traffic and collateral crime.⁶⁷

The Joint Committee report established that the 1973 drug law had made no measurable contribution to any of these goals.

There is, moreover, considerable opinion among judges and drug experts that the law has had negative effects.

The Addiction Services Agency of N.Y.C. published in 1977 its survey of 100 N.Y.C. judges and drug rehabilitation specialists.⁶⁸

About 70% of both judges and drug rehabilitation specialists were dissatisfied with the 1973 law and wanted less reliance on legal sanctions.⁶⁹ More than half thought that the new law had actually had negative results on the drug problem,⁷⁰ including the introduction of minors into the drug distribution network because of their legal exemption from the mandatory life penalties.⁷¹

⁶⁵ Id., p. 95

⁶⁶ Id., p. 96

⁶⁷ People v Broadie, 37 NY2d 100, 114-15, 371 NYS2d 471, 478-79 (1975).

⁶⁸ Addiction Services Agency, A Survey on the Effects of Drug Laws: Preliminary Findings (N.Y.C. Addiction Services Agency, 65 Worth St., N.Y.C. 10013, Jan. 18, 1977).

⁶⁹ Id., p. 14-15.

⁷⁰ Id., p. 8.

⁷¹ Id., p. 6.

4. SUMMARY OF POINT II.

The 1973 New York drug law has reliably been shown to have made no measurable contribution either to acceptable goals of punishment generally or to the specific goals sought by the legislature for this particular law.

The law is worse than "the purposeless and needless imposition of pain and suffering". It is counterproductive.

The history of our drug laws amply demonstrates that stiffer penal sanctions for drug offenses have served to increase crime, reduce social productivity, and multiply adverse physiological effects of the drug use. The new law has had the additional effect of introducing minors into the drug distribution system.

The counterproductiveness of the new law is further emphasized by the availability of much less drastic measures which are far superior. Methadone maintenance and other existing programs in New York had recently achieved high degrees of success in making heroin addicts socially productive and in decreasing criminality among them. The British and Kentucky experiences with heroin maintenance demonstrate that its use in conjunction with other treatment programs all but eliminates the adverse criminal, social, and medical effects commonly associated with heroin addiction. Penal sanctions for unauthorized sale would also take on new meaning under such programs.

We do not propose that this court could or should force the New York legislature into a particular policy. But this court can and should force the state to abandon its present excessive and purposeless penalties by declaring them unconstitutional.

As Andrew Weil said. in The Natural Mind, "I cannot but feel that what we are doing to solve the drug problem is the drug problem."

CONCLUSION - RELIEF SOUGHT

A. THE CLASS A FELONY CLASSIFICATION SHOULD BE VOIDED.

The classification of the crimes of criminal possession and sale of controlled substances as class A felonies should be declared unconstitutional as a violation of the 14th Amendment due process and equal protection clauses, the 8th Amendment cruel and unusual punishment clause, and the police powers.

Alternatively, the classification of the third degree of those crimes as class A-III felonies, under the last sentence of Penal Law Sections 220.16 and 220.39, should be declared unconstitutional.

Alternatively, the classification should be declared unconstitutional as it applies to the opiates.

With the unconstitutionality of the classification itself, all the accessory sentencing provisions would fall automatically, since they are made to apply only to class A drug felonies.

B. RE-CLASSIFICATION ALTERNATIVES.

The Penal Law is silent about what sentence attaches to an offense for which the authorized sentence has been voided. The proper sentence would appear to depend on the extent to which the New York sentencing structure for narcotics sales is found to be cruel and unusual or to work a denial of equal protection of the laws.

If, as is urged, the court finds that the classification of narcotics sales as a class A felony, placing it among only the

most heinous of dangerous crimes, is cruel and unusual, the following options can be considered:

(1) The court could treat the offense as an unclassified felony defined outside the Penal Law, which is to be considered a class E felony.¹ This section was drafted when all offenses defined in the Penal Law were classified, and did not contemplate the de-classification of any of those offenses, but might be interpreted as being intended to act as a saving clause to prevent any offense from being left without an authorized sentence.

(2) The court might re-classify the offense at the next lowest level not barred by the cruel and unusual punishment or equal protection clauses. Class B felonies embrace all the most violent and dangerous crimes (short of murder, kidnapping 1st, and arson 1st), such as the first degrees of rape, assault, robbery, and manslaughter. The seriousness and dangerousness of the crime of selling narcotics cannot be equated with these offenses, and it should therefore be re-classified not higher than as a class C felony, which carries a discretionary sentence of up to 15 years,² which is still much higher than the 5-year maximum recommended by most authorities.

¹ P.L. Sec. 55.10 (1) (b) provides that: "Any offense defined outside this chapter (the Penal Law) which is declared by law to be a felony without specification of the classification thereof, or for which a law outside this chapter provides a sentence to a term of imprisonment in excess of one year, shall be deemed a Class E felony."

² P.L. Secs. 70.00 (2) (c); 70.00 (3) (b).

(3) The court could decide that the offense should revert to whatever classification applied before the new drug law raised it to the class A level, if the old classification is constitution³. The sale of narcotics was formerly a class C felony.

(4) The Court could simply void the classification and remand to the state courts for a determination of the proper classification to be imposed, preferably with some guidance from this Court.

C. ALTERNATIVELY, ALL OR ANY OF THE ACCESSORY SENTENCING PROVISIONS SHOULD BE VOIDED.

If the Court decides that the classification itself is not void, the court should then declare unconstitutional all or any of the severable accessory sentencing provisions applicable to class A drug felons:

(1) The court should void Penal Law Sec. 70.00 (2) (a), insofar as it makes the imposition of life imprisonment mandatory, leaving life imprisonment as the maximum, to be imposed in the court's discretion only when warranted by the particular circumstances of the case.

(2) The court should void Penal Law Sec. 70.00 (3) (a), insofar as it makes the imposition of a minimum term of imprisonment of 1 to 8 1/3 years for a class A-III felony mandatory, leaving the court free to place an offender on probation or impose a lesser sentence.

³
Former P.L. Sec. 220.34.

(3) The court should void Penal Law §60.05(1), which prohibits sentences of probation, conditional discharge, and unconditional discharge for these offenses.

(4) The court should void Mental Hygiene Law §81.25(b)(3), insofar as it prohibits addicts charged with a class A felony from being certified for civil commitment to a drug rehabilitation program.

Dated: February 15, 1978.

Respectfully submitted,

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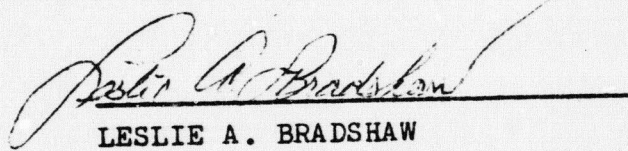
CERTIFICATE OF SERVICE

This is to certify that on February 15, 1978, I served two copies of the Brief of Petitioners-Appellants and one copy of the accompanying motion for permission to extend time for filing and to file a brief exceeding 70 pages in length upon the following counsel by U.S. mail, postage prepaid:

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